SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 559

GENERAL BAKING COMPANY, PETITIONER,

vs.

LUTHER A. HARR (SUCCESSOR TO WILLIAM D. GORDON), SECRETARY OF BANKING FOR THE COMMONWEALTH OF PENNSYLVANIA, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX.

	Original	Print
Record from D. C. U. S., Eastern Pennsylvania	1	1
Docket entries	1	1
Amended bill of complaint	4	3
Recital as to exhibits	20	14
Answer to amended bill of complaint	21	15
Opinion sur pleadings and proofs, Kirkpatrick, J.	30	21
Amended bill of complaint as amended	38	27
Exhibit "A"—Letter dated June 12, 1925, from Franklin Trust Company to General Baking Company	55	39
Exhibit "B"—Letter dated August 20, 1925, from General Baking Company to Franklin Trust Company	57	40
Exhibit "C"—Letter dated August 22, 1925, from Franklin Trust Company to General Baking Company	61	41

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—8629-C

	Original	Print
Record from D. C. U. S., Eastern Pennsylvania—Continued.		
Amended bill of complaint as amended—Continued.		
Exhibit "D"—Letter dated September 9, 1925, from General Baking Company to Franklin Trust Company	64	43
Exhibit "E"—Letter dated September 11, 1925, from Franklin Trust Company to General Baking Company	67	44
Exhibit "DD"—Letter dated September 26, 1925, from Franklin Trust Company to General Baking Company	69	45
Exhibit "EE"—Letter dated September 28, 1925, from General Baking Company to Franklin Trust Company	71	46
Answer to amended bill of complaint as amended	73	47
Plaintiff's requests for findings of fact and conclusions of law	84	54
Recital as to exhibits	108	73
Opinion sur re-argument, Kirkpatrick, J.	109	73
Decree	114	77
Assignments of error	115	77
Petition for appeal	154	109
Order allowing appeal	155	109
Clerk's certificate (omitted in printing)	156	
Proceedings in U. S. C. C. A., Third Circuit	157	111
Order assigning judge	157	111
Minute entry of argument and submission	158	111
Opinion, Davis, J.	159	112
Judgment, September 28, 1934	162	114
Petition for rehearing	163	115
Order granting petition for rehearing	164	133
Minute entry of reargument and submission	165	133
Opinion on reargument, Davis, J.	166	134
Judgment, September 11, 1936	172	138
Memorandum, Davis, J., correcting opinion	173	139
Judgment, October 16, 1936	174	140
Clerk's certificate	175	140
Stipulation and order substituting parties defendant	176	142
Order allowing certiorari	178	143

[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SEPTEMBER TERM, 1931

No. 6783

GENERAL BAKING COMPANY

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge

Conlen, LaBrum & Beechwood.
C. S. Wesley.

DOCKET ENTRIES

Nov. 12, 1931. Bill of Complaint filed.

Nov. 12, 1931. Motion for preliminary injunction filed.

Nov. 12, 1931. Subpœna exit—returnable December 2, 1931.

Nov. 12, 1931. Opinion, Dickinson, J., sur motion for preliminary injunction filed.

Nov. 16, 1931. Subpœna returned: "service accepted" and instruction to enter appearance of C. S. Wesley, Esq., for defendants endorsed thereon, and filed.

Apr. 25, 1932. Stipulation of counsel that leave be granted plaintiff to file amended bill of complaint and [fol. 2] Decree granting leave to file Amended Bill of Complaint filed.

Apr. 25, 1932. Amended Bill of Complaint filed.

Apr. 27, 1932. Printed Copy of Amended Bill of Complaint, filed.

May 7, 1932. Answer to Amended bill of Complaint, filed.

May 9, 1932. Præcipe to place case on argument list, filed.

May 13, 1932. Printed copy of answer to amended bill of complaint, filed.

June 21, 1932. Argued sur P. & P.

Oct. 11, 1932. Opinion, Kirkpatrick, J. dismissing Bill, with costs, filed.

Nov. 30, 1932. Petition for leave to file amended answer to amended bill of complaint, filed.

Nov. 30, 1932. Answer to petition for leave to file amended answer, filed.

Nov. 30, 1932. Decree granting leave to amend amended bill of complaint, to file answer to amended bill of complaint within 15 days after service of amended bill of complaint as amended and assigning case for reargument, filed.

Dec. 6, 1932. Amended bill of complaint as amended, filed.

Dec. 29, 1932. Answer to amended bill of complaint, as amended, filed.

Mar. 20, 1933. Plaintiff's requests for findings of fact and conclusions of law, filed.

[fol. 3] June 8, 1933. Opinion, Kirkpatrick, J. reaffirming order for dismissal of Bill of Complaint, filed.

June 14, 1933. Decree dismissing Bill of Complaint, costs to be paid by plaintiff, filed.

Sept. 5, 1933. Assignments of Error, filed.

Sept. 8, 1933. Petition for Appeal, filed.

Sept. 8, 1933. Decree allowing appeal, filed.

Sept. 11, 1933. Bond Sur appeal with Fidelity and Casualty Company of Maryland, surety in $250 and Decree approving same, filed.

Sept. 11, 1933. Citation allowed and issued.

Oct. 6, 1933. Citation returned—service accepted and filed.

Oct. 7, 1933. Præcipe for transcript of record sur appeal, filed.

[fol. 4] IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, SEPTEMBER TERM, 1931

In Equity. No. 6783

GENERAL BAKING COMPANY, a Corporation,

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, a Corporation, and John J. Sullivan, Special Deputy in Charge

AMENDED BILL OF COMPLAINT—Filed April 25, 1932

To the Honorable, the Judges of the said Court:

Your orator complains and says:

1. Your orator is the General Baking Company, a corporation organized and existing under the laws of the State of New York, with principal offices and place of business in New York City, New York, and at the times hereinafter mentioned, sold and distributed bread, cakes, and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania.

2. The defendants are William D. Gordon, Secretary of the Department of Banking for the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy, who, at the close of the business day of October 5, 1931, closed and took [fol. 5] possession and control of the business and property of the Franklin Trust Company, a corporation engaged in banking and organized under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania.

3. The amount in controversy herein is in excess of three thousand dollars ($3,000), exclusive of interest and costs, and the parties involved are citizens of different States of the United States.

4. In June of 1925, the Franklin Trust Company sought to enter into an agreement with your orator for the purposes and under the terms and conditions as are hereinafter averred in paragraph 8 hereof.

5. On or about June 13, 1925, your orator received a letter from the Franklin Trust Company, dated June 12, 1925, which stated, inter alia:

"We will agree to collect deposits from your various Philadelphia plants, and deliver weekly payrolls to these branches in either bulk or individual envelopes,—this to be optional with you,—on days and at times you may elect. We hope, however, that you will arrange for payroll delivery and deposit collection to be made simultaneously wherever possible.

"It is our understanding that you have, or contemplate opening, branches in the following places:

"Norristown, Trenton, Ocean City, Burlington, Atlantic City, Princeton, Wildwood, Pleasantville, Clementon, Wilmington, Berlin, Chester, Camden, Vineland, Millville, Bridgeton, Sea Isle City.

[fol. 6] "We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above list that you include in this district.

"In the event that the above plan is acceptable to you, the minor details, such as mailing duplicate deposit tickets etc., will all be arranged in accordance with your wishes.

"In consideration of the above it is our understanding that you will maintain with us a general account, wherein all moneys collected will be deposited, the entire balance of which we will remit to you weekly; also an active checking account, the funds to be deposited from your main office, the balance to be maintained on an average of not less than $25,000.00, which will receive interest at the rate of 2% per annum."

A copy of said letter is attached hereto, marked "Exhibit A," and made a part hereof.

6. On or about August 20, 1925, your orator sent a letter to the Franklin Trust Company, stating, inter alia:

"While I have outlined to Mr. Vance the operation of the accounts to be maintained with you I will confirm it herewith: You are to maintain one account for each of our three branches or a total of three accounts to be known as "General Baking Company Disbursement Account." You are to operate and maintain one account for each of our

three branches or a total of three accounts to be known as "General Baking Company Deposit Account". The official designation of the accounts will be for instance: General Baking Company North Philadelphia Plant Disbursement Account, General Baking Company North Philadelphia Plant Deposit Account; General Baking Company South Philadelphia Plant Disbursement Account, General Baking [fol. 7] Company South Philadelphia Plant Deposit Account, General Baking Company West Philadelphia Plant Disbursement Account, General Baking Company West Philadelphia Plant Deposit Account.

"Disbursement Accounts:

"These accounts represent the checking accounts of our bakeries and you will kindly honor all checks drawn on these accounts signed by the authorized signatures duly given you. It is understood in accordance with the enclosed copies of resolutions that in addition to the manager's signature to the checks drawn by these plants, there may be at times checks drawn by the executive officers to be countersigned by the President or Vice President and signed by the Treasurer or Assistant Treasurer which you will also honor. The only items of deposit or credit to this account will be by check from this main office to your order and deposited by our bakery plant in your bank.

"Deposit Accounts:

"These accounts will be used for the deposit of monies received by our bakery plants against which there will be no checking authority except those checks which may be drawn by this main office and signed by the Treasurer or Assistant Treasurer and countersigned by the President or Vice President. Each day the bakery will deliver to your bank the deposit of monies received by them which should be credited to the General Baking Company's respective Deposit Accounts. Each day when delivering a deposit to your bank the bakery's representative will hand your representative a printed post card advice of deposit made which should be signed by you and mailed direct to the executive offices of the General Baking Company, 342 Madison Avenue, New York City.

"On Monday of each week it is understood we will receive from you in cash funds the balance of the three de- [fol. 8] posit accounts as of the close of business the pre-

vious Saturday night. As to the method of transfer, we would be very glad to follow your suggestions and in the event that you may wish to make the transfer direct to our New York depositary the American Exchange-Pacific National Bank, 128 Broadway, New York City, we ask that a memoranda of the transactions for the week covering the transfer be mailed direct to this office for purposes of reconciliation with our records."

A copy of said letter is attached hereto, marked "Exhibit B," and made a part hereof.

7. On or about August 24, 1925, your orator received a letter from the Franklin Trust Company, dated August 22, 1925, which stated, inter alia:

"We will agree to collect your daily deposits from your Philadelphia plants, and deliver weekly payrolls in envelopes to these plants on such days and at such time that will be agreeable to the various managers of said plants. Wherever possible however, we trust that you can arrange for payroll delivery and collections to be made simultaneously.

"We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above that come within the Philadelphia zone.

"You are to send us a general letter of instructions covering detail of operation, at the time that you send us the usual and necessary certifications of signatures.

"In consideration of the above it is our understanding that you will maintain with us two (2) accounts, one to be known as the Deposit Account, and the other to be known as the Disbursement Account. The Deposit Account is for the purpose of handling daily collections. All monies [fol. 9] received from your Philadelphia plants and out of town distributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, either through our Federal Reserve correspondent, or through our direct New York correspondent bank, whichever we conclude to be the most effective for your purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock in the afternoon.

"The Disbursement Account is the active checking account for the benefit of the branches in Philadelphia. On Wednesday of each week you will send to this account approximately $25,000.00 for each of the three (3) plant disbursement accounts. You are to file with us authorized signatures of branch managers and assistant branch managers to cover this account, and it is also understood that in addition to such signatures we are to honor checks that may be drawn from time to time by the executive officers, signed by the Treasurer or Assistant Treasurer, and counter-signed by the President or Vice-President."

A copy of said letter is attached hereto, marked "Exhibit C," and made a part hereof.

8. On or about August 25, 1925, your orator entered into an oral agreement with the Franklin Trust Company, the terms and conditions of which were:

(a) Your orator would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account."

(b) On Wednesday of each week, your orator would forward, from its New York office to the Franklin Trust [fol. 10] Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from your orator's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks; on Monday of each week to your orator, or its depository in New York City; said account to be known as a "Deposit Account."

(d) The Franklin Trust Company would select, subject to the approval of your orator, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be

mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to your orator, or its depository in New Yerk City.

(e) That your orator might, at the special request and for the sole benefit of the Franklin Trust Company, from [fol. 11] time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby your orator would allow the Franklin Trust Company to retain certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums so retained to be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

9. The Franklin Trust Company, pursuant to the terms of said agreement, referred to in Paragraph 8 hereof, with the approval of your orator, selected the following banks in New Jersey, Delaware and Eastern Pennsylvania (hereinafter called correspondent banks):

The First Mechanics National Bank of Trenton, Trenton, N. J.

West Jersey Trust Company, Parkside Branch, Camden, N. J.

The First National Bank, Pleasantville, N. J.

Delaware County National Bank, Chester, Pa.

National Bank of Chester Valley, Coatesville, Pa.

The Wayne Title & Trust Company, Wayne, Pa.

Wilmington Trust Company, Wilmington, Del.

The Allentown National Bank, Allentown, Pa.

Farmers National Bank and Trust Company, Reading, Pa.

10. On September 27, 1925, your orator received a letter from the Franklin Trust Company, dated September 26, [fol. 12] 1925, to the effect that, inasmuch as collections made on Thursday by the correspondent banks were noted

on their books on Friday, and advices thereof were received by, and noted on the books of the Franklin Trust Company on Saturday, the last out-of-town collections to be included in the amount forwarded each Monday to your orator in New York City would be those received by the correspondent banks on the preceding Thursday. Your orator acknowledged this by letter, dated September 28, 1926. Copies of these letters are attached hereto, made a part hereof, and marked "Exhibit D" and "Exhibit E," respectively.

11. From August, 1925, until August, 1930, your orator and the Franklin Trust Company performed all the terms and conditions of the agreement, (referred to in Paragraph 8 hereof).

12. In accordance with Clause (e) of the agreement (referred to in Paragraph 8 hereof) your orator, at the special request and for the sole benefit of the Franklin Trust Company, did, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby the Franklin Trust Company retained certain sums for certain periods of time, instead of forwarding to your orator, or its depository, in New York City. The sums left by your orator in accordance with these special agreements were subject to call by check signed by authorized officers of your orator. The approximate dates of said agreements, the total sums retained, and the dates when the sums were called are as follows:

[fol. 13] November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
Called by three checks:		
One dated March 29, 1928	140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	100,000.00	440,000.00
June, 1928		$100,000.00
Called by check dated June 29, 1928	$100,000.00	100,000.00

13. In August, 1930, your orator and the Franklin Trust Company orally agreed to, and did, modify the agreement of August, 1925 (referred to in Paragraph 8 hereof), so that the terms and conditions were:

(a) That your orator would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

(c) That on Wednesday of each week your orator would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

[fol. 14] (d) That said Franklin Trust Company would continue to accept from your orator's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to your orator, or its depository, in New York City; said account to continue to be known as a "Deposit Account."

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by your orator, would continue to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday and Wednesday of each week, to your orator, or its depository, in New York City.

(f) That your orator might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and dis-

tinct oral agreements with the Franklin Trust Company [fol. 15] whereby your orator would allow the Franklin Trust Company to retain certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

14. From August, 1930, until October 5, 1931, or thereabout, your orator carried out and performed all of its obligations under the terms of the said agreement (referred to in Paragraph 13 above), and in accordance with Clause (f) thereof, at the oral request of the Franklin Trust Company, your orator orally agreed to, and did, allow the Franklin Trust Company to retain during September and the early part of November, 1930, sums totalling $100,000.00 which were called by check, dated November 18, 1930, in the amount of $100,000.00.

15. The Franklin Trust Company, in accordance with Clauses (d) and (e) of the said agreement (referred to in Paragraph 13 above), forwarded, on Monday and Wednesday of each week, the entire amount of cash and the proceeds of checks and drafts, collected during the period from August, 1930, to September 30, 1931, except the said sum of $100,000.00 (referred to in Paragraph 14 hereof), and the sum of $1917.10 (referred to in Paragraph 19 hereinafter).

16. Your orator delivered to the correspondent banks, for the purpose set forth in Clause (e) of Paragraph 13 hereof, drafts, checks and cash, on the dates and in the amounts, as follows:

[fol. 16]

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less returned check			20.85
			$30,486.16

17. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks, received on October 3 and 5, 1931, and credit advices thereof were received by the Franklin Trust Company, on or after October 6, 1931.

18. The checks and drafts delivered to the correspondent banks by your orator on October 3 and 5, 1931, were not collected by them until October 6, 1931, or thereafter.

19. On September 26, 1931, your orator, for the purpose specified in said agreement (referred to in Paragraph 13, Clause (e) hereof), delivered cash, also drafts and checks, in the amount of $1,917.10 to the Wilmington Trust Company, Wilmington, Delaware, but through error, advice of the receipt of said sum by the Wilmington Trust Company was not received by the Franklin Trust Company until October 6, 1931, or thereafter.

20. The total amount of cash, drafts and checks delievered by your orator to the said correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose set forth in Clause (e) of said agreement (referred to in Para- [fol. 17] graph 13 hereof), was $32,403.26, which sum was in possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow pending a determination by this Court as to whom it should be paid.

21. Your orator delivered to the Franklin Trust Company in Philadelphia for the purpose set forth in Clause (d) of the agreement (Paragraph 13 hereof), checks, drafts and cash on the dates and in the amounts, as follows:

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17

22. The drafts and checks delivered by your orator to the Franklin Trust Company on October 3, 1931, were not colected by it until on or after October 6, 1931.

23. The Franklin Trust Company did not forward on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03, delivered to it on October 3, 1931, or a total sum of $40,642.67.

24. The cash, together with the proceeds from the drafts and checks in the amount of $49,590.17 (referred to in Paragraph 21 hereof), were diverted to, and mingled with, the cash funds of Franklin Trust Company, without your orator's consent or approval.

[fol. 18] 25. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, were augmented to the extent of $49,590.17, by your orator's delivery to the Franklin Trust Company of the said cash, drafts and checks (referred to in Paragraph 21 hereof).

26. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, have been, at all times since the Franklin Trust Company accepted from your orator the cash, drafts and checks (referred to in Paragraph 21 hereof), and now are, in excess of the total amount of said cash, and the proceeds of said drafts and checks.

27. There were, and now are, assets of the Franklin Trust Company in the possession and control of the defendants sufficient to pay in full your orator and all other preferred claimants.

28. Your orator has demanded of the defendant, William D. Gordon, through his agent in charge, defendant John J. Sullivan, the sum of $32,403.26, now held in escrow, and the sum of $49,590.17, or the total sum of $81,993.43, but the defendants refused, and still refuse, to pay the said sum or any part thereof to your orator.

29. Your orator is informed, believes and, therefore, avers, that it has no plain, adequate, and complete remedy at law.

Wherefore, your orator prays:

(a) That it be ordered and decreed that the defendants hold in trust for your orator the sum of $49,590.17, accepted by the Franklin Trust Company for the purpose of forwarding to your orator in New York City;

[fol. 19] (b) That it be ordered and decreed that the total sum of $32,403.26, collected by the correspondent banks for forwarding by the Franklin Trust Company to your orator in New York City, and now held in escrow, is the property of, and belongs to, your orator;

(c) That it be ordered and decreed that your orator has a lien on the assets of the Franklin Trust Company now in the possession and control of the defendants;

(d) That it be ordered and decreed that your orator has a lien on the sum of $32,403.26, now held in escrow;

(e) That it be ordered and decreed that the defendants pay immediately to your orator the said sum of $49,590.17, with legal interest thereon from October 5, 1931;

(f) That it be ordered and decreed that the sum of $32,403.26, together with interest thereon, now held in escrow be immediately paid to your orator;

(g) That such other and further relief as the equities in this case may require and as your Honors may deem proper be ordered and decreed.

And it will ever pray, etc.

Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Complainant.

[fol. 20] *Duly sworn to by A. A. Clarke. Jurat omitted in printing.*

Exhibits "A," "B," "C," "D" and "E," Attached to Amended Bill of Complaint

The same as Exhibits "A," "B," "C," "D," "E," "DD" and "EE," presented as part of the amended Bill of Complaint as Amended (filed December 6, 1932) and printed side folios 55 to 72 of this record.

[fol. 21] IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED BILL OF COMPLAINT OF JOHN J. SULLIVAN, SPECIAL DEPUTY, ON BEHALF OF WILLIAM D. GORDON, SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, A CORPORATION, AND ON HIS OWN BEHALF AS SPECIAL DEPUTY IN CHARGE—Filed May 9, 1932.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, by John J. Sullivan, Special Deputy as Agent, and John J. Sullivan, Special Deputy in charge, come and file this, their answer to the complainant's amended Bill in the above matter, reserving the right of exception to the errors and uncertainties in the complainant's amended Bill contained, and for answer thereto and to so much and such parts thereof as defendants, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy as Agent, are advised are material or necessary to answer, say:

1. The averments of fact in paragraph 1 of said amended Bill are admitted to be true.

2. The averments of fact in paragraph 2 of said amended Bill are admitted to be true.

3. The averments of fact in paragraph 3 of said amended Bill are admitted to be true.

[fol. 22] 4. The defendants admit that an agreement was entered into between Franklin Trust Company and the complainant in August, 1925, under the terms and conditions as averred in plaintiff's amended Bill of Complaint, as qualified in this Answer.

5. The averments of fact in paragraph 5 of said amended Bill are admitted to be true.

6. The averments of fact in paragraph 6 of said amended Bill are admitted to be true.

7. The averments of fact in paragraph 7 of said amended Bill are admitted to be true.

8. Your deponents qualify the averments of paragraph 8 of the amended Bill of Complaint as follows:

The facts alleged in sub-divisions A and B of paragraph 8 of the amended Bill of Complaint are admitted. Defendants qualify the allegations in subdivision C of paragraph 8 of the amended Bill of Complaint as follows:

As by reference to the exhibits to the amended Bill of Complaint will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a "deposit account" in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository.

[fol. 23] The defendants qualify sub-division D of paragraph 8 of the amended Bill of Complaint as follows:

It was agreed by and between Franklin Trust Company and General Baking Company that Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania, and elsewhere, with banks of its selection, said banks to be approved by the complainant, to enable the cashiers of the distributors of the complainant in said towns to make deposits of their moneys (including cash, drafts, and checks) therein, said moneys to be credited in said banks to the account of the Franklin Trust Company, subject only to withdrawal by check of the Franklin Trust Company, a written acknowledgment of the receipt of said moneys to be mailed immediately upon receipt thereof by the outlying banks to the complainant, and a credit advice to be immediately forwarded to the Franklin Trust Company, all money so deposited in said outlying banks to be credited to the complainant's "deposit account" in the Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to the General Baking Company or its depository in New York City.

Defendants qualify sub-division E of paragraph 8 of the amended Bill of Complaint as follows:

Defendants have no knowledge that the agreement as therein set forth was entered into by the complainant and the Franklin Trust Company for the sole benefit of the Franklin Trust Company, and if the same is material demand proof thereof. Defendants aver moreover that the allegation that said contract was entered into for the sole benefit of the Franklin Trust Company is a conclusion of law and therefore irrelevant.

9. Defendants admit the averments of paragraph 9 of the amended Bill of Complaint, with the qualification that [fol. 24] the banks therein listed were selected under the terms and conditions of the agreement set forth in paragraph 8 of the amended Bill of Complaint, as qualified in this Answer.

10. The averments of fact in paragraph 10 of said amended Bill are admitted to be true.

11. Defendants admit the facts contained in paragraph 11 of the amended Bill of Complaint, with the qualification that the terms and conditions of the agreement which were performed by the complainant and the Franklin Trust Company were those terms and conditions contained in the agreement as alleged in paragraph 8 of the amended Bill of Complaint and as qualified herein.

12. Defendants admit the allegations in paragraph 12 of the amended Bill of Complaint, with the qualification that they deny that the funds deposited by the complainant, as therein alleged, were deposited at the special request and for the sole benefit of the Franklin Trust Company.

13. Your deponents admit the facts alleged in sub-divisions A, B, and C of paragraph 13 of the amended Bill of Complaint. Defendants, in reply to sub-division D thereof, admit that the Franklin Trust Company continued to accept moneys from complainant's distributors in Philadelphia, the same to be deposited in the "deposit account" of the complainant and to be forwarded, on Monday and Wednesday of each week, to complainant in New York City or its depository; and for further answer as to the terms and conditions of the contract under which such moneys

were deposited, refer to their allegations in reply to sub-division C of paragraph 8 of the amended Bill of Com- [fol. 25] plaint. Defendants, in reply to sub-division E of paragraph 13 of the amended Bill of Complaint, admit that the correspondent banks selected by the Franklin Trust Company and approved by complainant continued to accept moneys deposited by complainant's distributors in the outlying banks, said funds to be remitted to Franklin Trust Company and credited to the General Baking Company's "deposit account", and the proceeds thereof to be forwarded on Monday and Wednesday of each week to complainant or its depository in New York City; but for further answer qualify the allegations as to the terms and conditions of the agreement entered into between complainant and Franklin Trust Company in the same manner as they have qualified, by their answer, the allegations contained in sub-division D of paragraph 8 of complainant's amended Bill of Complaint.

In reply to sub-division F of paragraph 13 of the amended Bill of Complaint, defendants admit the facts as therein contained, with the qualification that the sums of money referred to therein were to be deposited by the complainant with the Franklin Trust Company from time to time at the special instance and for the sole benefit of the Franklin Trust Company, for the same reason as they have qualified in this Answer a similar averment in sub-division E of paragraph 8 of the amended Bill of Complaint.

14. Defendants admit the facts alleged in paragraph 14 of the amended Bill of Complaint, with the qualification that they have no knowledge that the funds deposited with Franklin Trust Company were so deposited at the oral request of the Franklin Trust Company and, if the same is material, demand proof thereof.

15. Defendants admit the allegations of paragraph 15 of the Bill of Complaint, with the qualification that where [fol. 26] reference is made to certain clauses in sub-divisions D and E of paragraph 13 of the amended Bill of Complaint, paragraph 14, and paragraph 19 of the amended Bill of Complaint, the defendants incorporate by reference their reply to the corresponding paragraphs in this Answer.

16. Defendants admit the allegations in paragraph 16 of the amended Bill of Complaint, with the qualification

that where reference is made to paragraph 13, sub-division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

17. The averments of fact in paragraph 17 of said amended Bill are admitted to be true.

18. The averments of fact in paragraph 18 of said amended Bill are admitted to be true.

19. Defendants admit the allegations in paragraph 19 of the amended Bill of Complaint, with the qualification that where reference is made to paragraph 13, sub-division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

20. Defendants admit the allegations in paragraph 20 of the amended Bill of Complaint, with the qualification that where reference is made to paragraph 13, sub-division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

21. Defendants admit the allegations in paragraph 21 of the amended Bill of Complaint, with the qualification that [fol. 27] where reference is made to paragraph 13, sub-division D, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as contained in this Answer.

22. The averments of fact in paragraph 22 of said amended Bill are admitted to be true.

23. The averments of fact in paragraph 23 of said amended Bill are admitted to be true.

24. The averments of fact in paragraph 24 of said amended Bill are admitted to be true.

25. The averments of fact in paragraph 25 of said amended Bill are admitted to be true.

26. The averments of fact in paragraph 26 of said amended Bill are admitted to be true.

27. The averments of fact in paragraph 27 of said amended Bill are admitted to be true.

28. The averments of fact in paragraph 28 of said amended Bill are admitted to be true.

29. Defendants deny that the complainant is entitled to the equitable relief prayed for in paragraph 29 of the amended Bill of Complaint, for the reasons as herein set forth. For further answer, defendants aver that whatever rights may be possessed by the complainant herein cannot now be asserted in a separate proceeding, and defendants allege that the proceedings against the Franklin Trust Company, whereby and wherein the Secretary of Banking took possession of the same, having been instituted in the Court of Common Pleas No. 5 of Philadelphia County, as of September Term, 1931, No. 3941, the District Court of the [fol. 28] United States for the Eastern District of Pennsylvania does not have jurisdiction to adjudicate and pass upon the facts and circumstances as alleged in the complainant's Bill in Equity. Deponents further aver that whatever rights may be possessed by the complainant cannot be asserted prior to the audit and adjudication of the account of the Deputy in charge of the Franklin Trust Company of his administration and liquidation of the affairs of said company, at which time and place the complainant may appear and establish its rights in the manner provided by the laws of the Commonwealth of Pennsylvania. Defendants further aver that the facts and circumstances as alleged in the Bill of Complaint and qualified herein do not establish a trust relationship between the complainant and Franklin Trust Company as to the sum of $49,590.17 which was on deposit in the Franklin Trust Company at the date the Secretary of Banking took possession thereof, nor a trust relationship as to the sum of $32,403.26, which sum was collected by the correspondent banks under the terms and conditions as set forth in the Bill of Complaint (as qualified herein) and was in their possession when the Secretary of Banking took possession of the business and property of the Franklin Trust Company and is now held in escrow, pending the determination of this action. Defendants aver that under the law, as applied to the facts herein, the complainant is not entitled to a preferred claim against the estate of the Franklin Trust Company now being administered by the Secretary of Banking, but has merely the status of depositor and as such must

present its claim at the audit of the account. Defendants further allege that, whatever relationship existed between the complainant and the Franklin Trust Company, the complainant is not entitled to a preferred claim at this time, and that no sums of money should be paid to the complain-
[fol. 29] ant until such time as the account of the Secretary of Banking in possession of the business and property of the Franklin Trust Company shall have been audited and the Court of Common Pleas No. 5 of Philadelphia County shall have ordered distribution of the funds accounted for therein.

Defendants further aver that the complainant has an adequate remedy at law and therefore is not entitled to equitable relief in the premises, and pray that the amended Bill of Complaint may be dismissed, with their reasonable costs and charges in this behalf sustained.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Company, by John J. Sullivan, Special Deputy as Agent.

Duly sworn to by John J. Sullivan. Jurat omitted in printing.

[fol. 30] IN UNITED STATES DISTRICT COURT

OPINION SUR PLEADINGS AND PROOFS—Filed October 11, 1932

KIRKPATRICK, J.:

This cause was heard upon bill and answer. Consequently, the answer is to be taken as true in all particulars whether responsive to the bill or not (Leeds v. Insurance Company, 15 U. S. 380; Terral v. Burke Construction Company, 257 U. S. 529) and only such averments of the bill as are not controverted are to be taken as admitted.

Franklin Trust Company is a banking institution in the city of Philadelphia which at the close of the business day of October 5, 1931, was taken over for liquidation by the Secretary of Banking of Pennsylvania and, which, it may be assumed, is largely insolvent. This plaintiff is endeavoring to impress certain of the funds of the bank, now in the hands of the special deputy in charge with a trust in its

favor. The plaintiff's case depends upon the legal effect of an oral agreement between it and the trust company made on October 25, 1925, and subsequently, on August —, 1930, slightly modified. From the averments of the bill and answer, the arrangement was as follows:

The plaintiff whose general offices were in New York had three principal places of business or plants in the city of Philadelphia, and in addition made sales through a number of distributors located at various points outside Philadelphia in Pennsylvania and New Jersey.

The Trust Company agreed to accept from the Philadelphia plants cash, drafts and checks, the same to be deposited in what was designated as "a deposit account" in the name of the plaintiff, and the cash together with the proceeds of [fol. 31] the drafts and checks to be forwarded on Mondays and Wednesdays of each week to the plaintiff in New York. The bill avers that the Trust Company was to take the drafts and checks "for collection". The answer which purports to "qualify the allegations" of the bill says "said deposits to be credited to the complainant * * * and on Monday of each week the balance in the deposit account * * * to be forwarded to * * * the General Baking Company in New York."

In addition to the foregoing, the parties designated certain out-of-town banks with which the Trust Company was to make arrangements by which the plaintiff's out-of-town distributors would deposit their moneys in such banks, subject to withdrawal only by check of the Trust Company, all money so deposited to be credited to the complainant's deposit account in the Trust Company upon the receipt by it of credit advices by the receiving banks, the proceeds to be forwarded to the plaintiff in New York on Mondays and Wednesdays along with the proceeds of the Philadelphia plants. The bill avers that the deposits in the out-of-town banks were to be "ear-marked as the funds" of the plaintiff. The "qualification" of the answer omits this averment.

The Trust Company undertook to make up and deliver weekly pay-rolls in envelopes to the Philadelphia plants, collecting the deposits at the same time, when possible.

In addition to the deposit account, the plaintiff agreed to open another account with the Trust Company—this one a checking account designated as its "disbursement account". This account was to be kept entirely separate from

the deposit account, and the plaintiff agreed that it would maintain it at an average balance of not less than $25,000 by means of weekly deposits from its New York office. Origi-
[fol. 32] nally, the Trust Company had agreed to allow 2% interest on this account but when, by the subsequent agreement, it was required to forward the balance in the disbursement account twice a week instead of once as previously, the interest provision was eliminated.

The disbursement account was not subject to check, except that the original agreement contemplated that the parties might from time to time specially agree to permit the balances in the disbursement account to remain in the Trust Company for longer than semi-weekly periods, in which case at the expiration of such agreed time the funds would be called by check of the plaintiff, instead of being sent to it in the usual way. Special agreements of this kind were made and carried out on three different occasions, at which times balances of $450,000, $440,000 and $100,000 respectively were allowed to remain with the Trust Company for periods of a month or two.

When the Trust Company closed its doors, it had on deposit approximately $36,000 in the disbursement account. The plaintiff admits that it has no preferred claim as to this amount and it is not involved in this case. There was $49,930.17 on deposit to the plaintiff's credit in the deposit account. In addition, the various out-of-town correspondent banks had accepted deposits of cash, drafts and checks from the plaintiff's out-of-town distributors amounting in all to $32,403.26. The receipt of this amount, had been noted on the books of those correspondent banks on Monday, October 5th, the last day on which the Trust Company was open for business and credit advices as to it arrived at the Trust Company on the following day.

The plaintiff originally attempted to enjoin the special deputy in charge of the bank from collecting these funds but, upon a stipulation made at the hearing of that proceeding, it was ordered that the defendants would collect and place
[fol. 33] this sum in escrow pending a decision by this court as to whom it should be paid.

It seems to be agreed that there was no segregation of the funds in the plaintiff's deposit account, but that whatever was received either direct from the plaintiff's plants in Philadelphia or from the out-of-town banks was mingled

with the general funds of the Trust Company. Just what the whole arrangement between the Trust Company and the correspondent banks was does not fully appear. It is plain however that the original agreement between the plaintiff and the Trust Company contemplated that all the deposits in the correspondent banks were ultimately to be paid into the plaintiff's deposit account in the Trust Company and dealt with in exactly the same way as the money directly deposited by the plaintiff's Philadelphia plants.

After a careful consideration of all the matters before me I am satisfied that the parties in this case did not create or contemplate a trust relation as to the deposit account, and that this applies equally to the money directly deposited by the plaintiff's Philadelphia plants and that received through the out-of-town correspondent banks.

The crux of the matter is whether it was intended that the Trust Company should have the use of the funds of this account during the brief periods for which they remained in its hands. It is extremely significant, though of course not conclusive, that the agreement between the parties does not contain any term expressly creating a trust relationship or any expression which even remotely suggests it. Even if the averment of the bill that the deposits were received "for collection" in the ordinary commercial sense could be taken as admitted (which is doubtful in view of the qualified answer) it would make little difference, since it is conceded that cash, drafts and checks were all to go into the deposit [fol. 34] account indiscriminately under the same terms and of course it would be patently absurd to speak of accepting cash deposit for collection. Nor was there any requirement that the plaintiff's deposit account was to be kept separate from the general funds of the Trust Company. The plaintiff was not to check upon it, and hence it was necessary to distinguish it in some way from its checking account which appears to be the only reason for its name.

The fact that the parties contemplated and actually made subsequent arrangements by which large amounts of money in the deposit account were allowed to remain with the Trust Company for considerable periods without anything being said or done as to change the character of the deposit or the relationship created thereby is more than merely suggestive. What could be the purpose of these special arrangements unless it was understood all along that the

money on deposit was being used by the Trust Company in its general banking business and it was desired to give them the use of more money for a longer time?

The general arrangement is not unusual in the case of chain stores and the like which do their principal banking in one city but have branch stores which take in large amounts of money in other places. At first it is a little difficult to identify the relationship which it established but upon examination it becomes clear enough. The Trust Company offered the plaintiff a service which relieved it of considerable difficulty and expense. Besides supplying its banking facilities for the transmission of the plaintiff's money to New York, it undertook the physical work of making the plaintiff's deposits both in Philadelphia and the surrounding territory as well as that of making up and delivering the plaintiff's pay-rolls in Philadelphia. As the agreement originally stood, unless it could use the funds on deposit, it [fol. 35] would receive practically no benefit from all this beyond what might accrue from the plaintiff's $25,000 checking account on which it will be remembered interest at 2% was originally to be paid. Of course that account was desirable, but it is significant that when the original agreement was modified so that the Trust Company was required to remit to New York twice a week instead of once, thus greatly reducing the average of the deposit account in its hand, it was relieved of paying interest on the checking account.

The creation of the separate checking account does not preclude the view taken by any means. The plaintiff in New York received immediate credit advice of all deposits made to its credit in the deposit account and probably at once credited them to its general funds in New York, and there may have been a number of reasons why it was convenient and desirable for it to keep this account intact for the semi-weekly remittances.

The parties have argued the case as though there were two questions involved. First, the existence of the trust relationship and, second, the traceability of the trust fund if any. I agree with the plaintiff that the doctrine of Knatchbull v. Hallett is the law of both Pennsylvania and the federal courts but its application depends upon a tortious intermingling of trust funds, because, as the court says, the presumption is that withdrawals so far as possible are honestly made from the trustee's own funds and therefore what is

left would be trust money. If, however the mingling of the funds is innocent the reason of the rule fails. And, of course, it is innocent when both parties agreed or intended that it should be mingled. If, to go a step further, such was the agreement or intention, not only would there be no rule for tracing the trust but there would be no trust. Any deposit by which money is to be used for the general business [fol. 36] of the depository by its inherent nature creates the relationship of debtor and creditor, and immediately negatives the existence of a trust.

All the questions argued in the case therefore depend upon the essential issue whether this deposit account was to be used by the Trust Company in its general banking business. I think that that was clearly the intention.

It follows that there is no essential difference in the character of the deposit account in the Trust Company and the deposit in the hands of the correspondent banks at the close of business on October 5th. It was understood that these would all go into the general deposit account. It was understood therefore that they would be mingled with and used in the same manner as the general funds of the bank. Upon the deposit being made in a correspondent bank, it was immediately credited to the Trust Company and thereafter was subject to withdrawal only by that company. Of course there must have been a physical segregation of these deposits in the hands of the corrspondent banks for some brief period immediately after their receipt. Nor can the precise legal effect of their daily credit advices to the Trust Company be determined from the bill and answer. But what the parties intended as the ultimate disposition of the feud is the controlling factor. The mere fact that time and banking machinery were required to get these deposits into the general moneys of the Trust Company during which period they may have been susceptible of identification is unimportant, unless there were something definite to indicate that the parties intended that two different kinds of relationship should successively come into being with regard to those out-of-town deposits, namely, a trust relationship until they reached the deposit account and a debtor and creditor relationship thereafter. That would be a curious [fol. 37] thing to do, and there is nothing of the sort in this case.

As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds does not mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority.

The general conclusion is that there is no trust relationship as to either of the funds involved in this suit and the plaintiff is not entitled to a preferred claim against the estate of the Franklin Trust Company, but has merely the status of a depositor.

The bill may be dismissed, with costs.

By the Court.

W. H. Kirkpatrick, J.

[fol. 38] IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT AS AMENDED—Filed December 6, 1932

To the Honorable, the Judges of the Said Court:

Your orator complains and says:

1. Your orator is the General Baking Company, a corporation organized and existing under the laws of the State of New York, with principal offices and place of business in New York City, New York, and at the times hereinafter mentioned, sold and distributed bread, cakes, and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania.

2. The defendants are William D. Gordon, Secretary of the Department of Banking for the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy, who, at the close of the business day of October 5, 1931, closed and took possession and control of the business and property of the Franklin Trust Company, a corporation engaged in

banking and organized under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania.

3. The amount in controversy herein is in excess of three thousand dollars ($3000), exclusive of interest and costs, and the parties involved are citizens of different States of the United States.

4. In June of 1925, the Franklin Trust Company sought to enter into an agreement with your orator for the purposes and under the terms and conditions as are hereinafter averred in paragraph 8 hereof.

[fol. 39] 5. On or about June 13, 1925, your orator received a letter from the Franklin Trust Company, dated June 12, 1925, which stated, inter alia:

"We will agree to collect deposits from your various Philadelphia plants, and deliver weekly payrolls to these branches in either bulk or individual envelopes,—this to be optional with you,—on days and at times you may elect. We hope, however, that you will arrange for payroll delivery and deposit collection to be made simultaneously wherever possible.

"It is our understanding that you have, or contemplate opening, branches in the following places:

"Norristown, Trenton, Ocean City, Burlington, Atlantic City, Princeton, Wildwood, Pleasantville, Clementon, Wilmington, Berlin, Chester, Camden, Vineland, Millville, Bridgeton, Sea Isle City.

"We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above list that you include in this district.

"In the event that the above plan is acceptable to you, the minor details, such as mailing duplicate deposit tickets, etc., will all be arranged in accordance with your wishes.

"In consideration of the above it is our understanding that you will maintain with us a general account, wherein all moneys collected will be deposited, the entire balance of which we will remit to you weekly; also an active checking account, the funds to be deposited from your main office, the

balance to be maintained on an average of not less than $25,000.00, which will receive interest at the rate of 2% per annum."

[fol. 40] A copy of said letter is attached hereto, marked "Exhibit A," and made a part hereof.

6. On or about August 20, 1925, your orator sent a letter to the Franklin Trust Company, stating, inter alia:

"While I have outlined to Mr. Vance the operation of the accounts to be maintained with you I will confirm it herewith: You are to maintain one account for each of our three branches or a total of three accounts to be known as 'General Baking Company Disbursement Account.' You are to operate and maintain one account for each of our three branches or a total of three accounts to be known as 'General Baking Company Deposit Account.' The official designation of the accounts will be for instance: General Baking Company North Philadelphia Plant Disbursement Account, General Baking Company North Philadelphia Plant Deposit Account, General Baking Company South Philadelphia Plant Disbursement Account, General Baking Company South Philadelphia Plant Deposit Account, General Baking Company West Philadelphia Plant Disbursement Account, General Baking Company West Philadelphia Plant Deposit Account.

"Disbursement Accounts:

"These accounts represent the checking accounts of our bakeries and you will kindly honor all checks drawn on these accounts signed by the authorized signatures duly given you. It is understood in accordance with the enclosed copies of resolutions that in addition to the manager's signature to the checks drawn by these plants, there may be at times checks drawn by the executive officers to be countersigned by the President or Vice President and signed by the Treasurer or Assistant Treasurer which you will also honor. The only items of deposit or credit to this account will be by check from this main office to your order and deposited by our bakery plant in your bank.

[fol. 41] "Deposit Accounts:

"These accounts will be used for the deposit of monies received by our bakery plants against which there will be

no checking authority except those checks which may be drawn by this main office and signed by the Treasurer or Assistant Treasurer and countersigned by the President or Vice President. Each day the bakery will deliver to your bank the deposit of monies received by them which should be credited to the General Baking Company's respective Deposit Accounts. Each day when delivering a deposit to your bank the bakery's representative will hand your representative a printed post card advice of deposit made which should be signed by you and mailed direct to the executive offices of the General Baking Company, 342 Madison Avenue, New York City.

"On Monday of each week it is understood we will receive from you in cash funds the balance of the three deposit accounts as of the close of business the previous Saturday night. As to the method of transfer, we would be very glad to follow your suggestions and in the event that you may wish to make the transfer direct to our New York depositary the American Exchange-Pacific National Bank, 128 Broadway, New York City, we ask that a memoranda of the transactions for the week covering the transfer be mailed direct to this office for purposes of reconciliation with our records."

A copy of said letter is attached hereto, marked "Exhibit B," and made a part hereof.

7. On or about August 24, 1925, your orator received a letter from the Franklin Trust Company, dated August 22, 1925, which stated, inter alia:

"We will agree to collect your daily deposits from your Philadelphia plants, and deliver weekly payrolls in envelopes [fol. 42] to these plants on such days and at such time that will be agreeable to the various managers of said plants. Wherever possible however, we trust that you can arrange for payroll delivery and collections to be made simultaneously.

"We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above that come within the Philadelphia zone.

"You are to send us a general letter of instructions covering detail of operation, at the time that you send us the usual and necessary certifications of signatures.

"In consideration of the above it is our understanding that you will maintain with us two (2) accounts, one to be known as the Deposit Account, and the other to be known as the Disbursement Account. The Deposit Account is for the purpose of handling daily collections. All monies received from your Philadelphia plants and out of town distributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, either through our Federal Reserve correspondent, or through our direct New York correspondent bank, whichever we conclude to be the most effective for your purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock in the afternoon.

"The Disbursement Account is the active checking account for the benefit of the branches in Philadelphia. On Wednesday of each week you will send to this account approximately $25,000.00 for each of the three (3) plant disbursement accounts. You are to file with us authorized signatures of branch managers and assistant branch managers to cover this account, and it is also understood that in addition to such signatures we are to honor checks that may be drawn [fol. 43] from time to time by the executive officers, signed by the Treasurer or Assistant Treasurer, and countersigned by the President or Vice-President."

A copy of said letter is attached hereto, marked "Exhibit C," and made a part hereof.

8. On or about August 25, 1925, your orator entered into an oral agreement with the Franklin Trust Company, the terms and conditions of which were:

(a) Your orator would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account."

(b) On Wednesday of each week, your orator would forward, from its New York office to the Franklin Trust Company, a sum sufficent to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from your orator's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the

cash, together with the proceeds of the drafts and checks, on Monday of each week to your orator, or its depository in New York City; said account to be known as a "Deposit Account."

(d) The Franklin Trust Company would select, subject to the approval of your orator, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately [fol. 44] upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to your orator, or its depository in New York City.

(e) That your orator might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby your orator would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by your orator's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

9. The Franklin Trust Company, pursuant to the terms of said agreement, referred to in Paragraph 8 hereof, with the approval of your orator, selected the following banks in New Jersey, Delaware and Eastern Pennsylvania (hereinafter called correspondent banks):

The First Mechanics National Bank of Trenton, Trenton, N. J.

West Jersey Trust Company, Parkside Branch, Camden, N. J.

The First National Bank, Pleasantville, N. J.
Delaware County National Bank, Chester, Pa.
National Bank of Chester Valley, Coatesville, Pa.
The Wayne Title & Trust Company, Wayne, Pa.
[fol. 45] Wilmington Trust Company, Wilmington, Del.
The Allentown National Bank, Allentown, Pa.
Farmers National Bank and Trust Company, Reading, Pa.

9A.

"On September 9th, 1925, your orator, through its Treasurer, wrote to the Franklin Trust Company, in part as follows: 'I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer of the American Exchange Pacific National Bank of $161,680.42. This transfer was not effected in cash funds.'

A true and correct copy of said letter is attached hereto and marked Exhibit 'D'. The Franklin Trust Company acknowledged receipt of said letter dated September 9th, on September 11th, 1925, in which it advised your orator as follows:

'Mr. Vance has handed me your letter of September 9th, advising that the transfer was not effected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

'We have advised the First National today again that this transfer *must* be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr. Vance tells me that you understand the situation thoroughly and we appreciate your broad minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again.'

[fol. 46] A true and correct copy of said letter is attached hereto and marked Exhibit 'E'."

10. On September 27, 1925, your orator received a letter from the Franklin Trust Company, dated September 26,

1925, to the effect that, inasmuch as collections made on Thursday by the correspondent banks were noted on their books on Friday, and advices thereof were received by, and noted on the books of the Franklin Trust Company on Saturday, the last out-of-town collections to be included in the amount forwarded each Monday to your orator in New York City would be those received by the correspondent banks on the preceding Thursday. Your orator acknowledged this by letter, dated September 28, 1925. Copies of these letters are attached hereto, made a part hereof, and marked "Exhibit 'DD'" and "Exhibit 'EE'" respectively.

11. From August, 1925, until August, 1930, your orator and the Franklin Trust Company performed all the terms and conditions of the agreement (referred to in Paragraph 8 hereof).

12. In accordance with Clause (e) of the agreement (referred to in Paragraph 8 hereof) your orator, at the special request and for the sole benefit of the Franklin Trust Company, did, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby the Franklin Trust Company was allowed to use certain sums for certain periods of time, instead of forwarding to your orator, or its depository, in New York City. The sums left by your orator in accordance with these special agreements were subject to call by check signed by authorized officers of your orator. The approximate dates of said agreements, the total sums used, and the dates when the sums were called are as follows:

[fol. 47]

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
Called by three checks:		
One dated March 29, 1928	140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	200,000.00	440,000.00
June, 1928		$100,000.00
Called by check dated June 29, 1928	$100,000.00	$100,000.00

13. In August, 1930, your orator and the Franklin Trust Company orally agreed to, and did, modify the agreement of August, 1925 (referred to in Paragraph 8 hereof), so that the terms and conditions were:

(a) That your orator would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

(c) That on Wednesday of each week your orator would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(d) That said Franklin Trust Company would continue to accept from your orator's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the [fol. 48] drafts and checks, on Monday and Wednesday of each week, to your orator, or its depository, in New York City; said account to continue to be known as a "Deposit Account."

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by your orator, would continue to accept, from distributors of your orator, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of your orator's; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to your orator in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday and Wednesday of each week, to your orator, or its depository, in New York City.

(f) That your orator might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and distinct oral agreements with the Franklin Trust Company whereby

your orator would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by your orator's check [fol. 49] only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

14. From August, 1930, until October 5, 1931, or thereabout, your orator carried out and performed all of its obligations under the terms of the said agreement (referred to in Paragraph 13 above), and in accordance with Clause (f) thereof, at the oral request of the Franklin Trust Company, your orator orally agreed to, and did, allow the Franklin Trust Company to use during September and the early part of November, 1930, sums totalling $100,000.00 which were called by check, dated November 18, 1930, in the amount of $100,000.00.

15. The Franklin Trust Company, in accordance with Clauses (d) and (e) of the said agreement (referred to in Paragraph 13 above), forwarded, on Monday and Wednesday of each week, the entire amount of cash and the proceeds of checks and drafts, collected during the period from August, 1930, to September 30, 1931, except the said sum of $100,000.00 (referred to in Paragraph 14 hereof), and the sum of $1917.10 (referred to in Paragraph 19 hereinafter).

16. Your orator delivered to the correspondent banks, for the purpose set forth in Clause (e) of Paragraph 13 hereof, drafts, checks and cash, on the dates and in the amounts, as follows:

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less returned check			20.85
			$30,486.16

[fol. 50] 17. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks, received

on October 3 and 5, 1931 and credit advices thereof were received by the Franklin Trust Company, on or after October 6, 1931.

18. The checks and drafts delivered to the correspondent banks by your orator on October 3 and 5, 1931, were not collected by them until October 6, 1931, or thereafter.

19. On September 26, 1931, your orator, for the purpose specified in said agreement (referred to in Paragraph 13, Clause (e) hereof), delivered cash, also drafts and checks, in the amount of $1,917.10 to the Wilmington Trust Company, Wilmington, Delaware, but through error, advice of the receipt of said sum by the Wilmington Trust Company was not received by the Franklin Trust Company until October 6, 1931, or thereafter.

20. The total amount of cash, drafts and checks delivered by your orator to the said correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose set forth in Clause (e) of said agreement (referred to in Paragraph 13 hereof), was $32,403.26, which sum was in possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow pending a determination by this Court as to whom it should be paid.

21. Your orator delivered to the Franklin Trust Company in Philadelphia for the purpose set forth in Clause (d) of the agreement (Paragraph 13 hereof), checks, drafts and cash on the dates and in the amounts, as follows:

[fol. 51]

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17.

22. The drafts and checks delivered by your orator to the Franklin Trust Company on October 3, 1931, were not collected by it until on or after October 6, 1931.

23. The Franklin Trust Company did not forward on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03 delivered to it on October 3, 1931, or a total sum of $40,642.67.

24. The cash, together with the proceeds from the drafts and checks in the amount of $49,590.17 (referred to in Paragraph 21 hereof), were diverted to, and mingled with, the cash funds of Franklin Trust Company, without your orator's consent or approval.

25. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, were augmented to the extent of $49,590.17, by your orator's delivery to the Franklin Trust Company of the said cash, drafts and checks (referred to in Paragraph 21 hereof).

26. The cash funds of the Franklin Trust Company, of which the defendants took possession and control, have [fol. 52] been, at all times since the Franklin Trust Company accepted from your orator the cash, drafts and checks (referred to in Paragraph 21 hereof) and now are, in excess of the total amount of said cash, and the proceeds of said drafts and checks.

27. There were, and now are, assets of the Franklin Trust Company in the possession and control of the defendants sufficient to pay in full your orator and all other preferred claimants.

28. Your orator has demanded of the defendant, William D. Gordon, through his agent in charge, defendant John J. Sullivan, the sum of $32,403.26, now held in escrow, and the sum of $49,590.17, or the total sum of $81,993.43, but the defendants refused, and still refuse, to pay the said sum or any part thereof to your orator.

29. Your orator is informed, believes and, therefore, avers that it has no plain, adequate, and complete remedy at law.

Wherefore, your orator prays:

(a) That it be ordered and decreed that the defendants hold in trust for your orator the sum of $49,590.17, accepted by the Franklin Trust Company for the purpose of forwarding to your orator in New York City;

(b) That it be ordered and decreed that the total sum of $32,403.26, collected by the correspondent banks for forwarding by the Franklin Trust Company to your orator in New York City, and now held in escrow, is the property of, and belongs to, your orator;

[fol. 53] (c) That it be ordered and decreed that your orator has a lien on the assets of the Franklin Trust Company now in the possession and control of the defendants;

(d) That it be ordered and decreed that your orator has a lien on the sum of $32,403.26, now held in escrow;

(e) That it be ordered and decreed that the defendants pay immediately to your orator the said sum of $49,590.17, with legal interest thereon from October 5, 1931;

(f) That it be ordered and decreed that the sum of $32,403.26, together with interest thereon, now held in escrow be immediately paid to your orator;

(g) That such other and further relief as the equities in this case may require and as your Honors may deem proper be ordered and decreed. And it will ever pray, etc.

Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Complainant.

[fol. 54] *Duly sworn to by A. A. Clarke. Jurat omitted in printing.*

[fol. 55] EXHIBIT "A" TO AMENDED BILL

June 12, 1925.

Mr. A. A. Clarke, Treasurer, General Baking Company, 342 Madison Avenue, New York City

DEAR MR. CLARK:

Referring to the conversation we had with you Friday last, we submit herewith a plan for the handling of your funds in Philadelphia and surrounding territory.

We will agree to collect deposits from your various Philadelphia plants, and deliver weekly payrolls to these branches in either bulk or individual envelopes,—this to be optional with you,—on days and at times you may elect. We hope, however, that you will arrange for payroll delivery and deposit collection to be made simultaneously wherever possible.

It is our understanding that you have, or contemplate opening, branches in the following places:

Norristown	Wildwood	Camden
Trenton	Pleasantville	Vineland
Ocean City	Clementon	Millville
Burlington	Wilmington	Bridgeton
Atlantic City	Berlin	Sea Isle City
Princeton	Chester	

We will make arrangements with banks of our selection in these different localities to enable your cashiers to make their regular deposits, and will also care for any additions you may make to the above list that you include in this district.

In the event that the above plan is acceptable to you, the minor details, such as mailing duplicate deposit tickets, etc., will all be arranged in accordance with your wishes.

[fol. 56] In consideration of the above it is our understanding that you will maintain with us a general account, wherein all moneys collected will be deposited, the entire balance of which we will remit to you weekly; also an active checking account, the funds to be deposited from your main office, the balance to be maintained on an average of not less than $25,000.00, which will receive interest at the rate of 2% per annum.

We would appreciate your giving this proposition very careful consideration, as it appears to us it has many advantages for your Company, such as the control of all of these accounts through one bank, the elimination of the hazard of carrying money through the streets, and the payroll service undoubtedly bringing about added economy and increased efficiency.

Our Mr. Vance, who presents this letter to you, will be glad to go into any further details we may have overlooked.

Assuring you it is our strong desire to bring about business relations with your Company, and anticipating a favorable reply, we are,

Very truly yours, —— ——; Vice President and Treasurer.

ABD; LAF.

(Here follow 2 photos, Exhibit B, side folios 57-58, 59-60.)

EXHIBIT "A" & "B" TO AMENDED BILL

GENERAL BAKING COMPANY

EXECUTIVE OFFICES

342 MADISON AVENUE.

NEW YORK.

Mr Fernan

August 20, 1925.

32 PLANTS
BALTIMORE, MD.
BOSTON, MASS
BROOKLYN, N. Y.
BUFFALO, N. Y.
CANTON, OHIO
CLEVELAND, OHIO
DETROIT, MICH.
HARTFORD, CONN
JERSEY CITY, N. J.
NEWARK, N. J.
NEW HAVEN, CONN.
NEW YORK, N. Y.
NEW ORLEANS, LA.
NORFOLK, VA.
PHILADELPHIA, PA.
PROVIDENCE, R. I.
ROCHESTER, N. Y.
ST. LOUIS, MO.
SPRINGFIELD, MASS.
STEUBENVILLE, OHIO
SYRACUSE, N. Y.
TOLEDO, OHIO
WASHINGTON, D. C.
WATERBURY, CONN.
WHEELING, W. VA.

Franklin Trust Company,
15th & Chestnut Streets,
Philadelphia, Pa.

Gentlemen:-

In accordance with my conversation with your Mr. Vance, I am enclosing herewith certified copy of resolution as to official signatures for the Company, certification of the present officials and their signatures, which does not include the President's signature due to the fact that he is out of town, but which can be supplied at a later date. I am also enclosing herewith two official General Baking Company specimen signature cards duly executed with the exception of the President which you will be furnished with at a later date.

Our plants will each deliver to you at their earliest convenience a letter of certification of their appointment as Manager of their respective plants with specimen signatures of their respective plants for the account to be termed "General Baking Company Disbursement Account".

While I have outlined to Mr. Vance the operation of the accounts to be maintained with you I will confirm it herewith: You are to maintain one account for each of our three branches or a total of three accounts to be known as "General Baking Company Disbursement Account". You are to operate and maintain one account for each of our three branches or a total of three accounts to be known as "General Baking Company Deposit Account". The official designation of the accounts will be for instance: General Baking Company North Philadelphia Plant Disbursement Account, General Baking Company North Philadelphia Plant Deposit Account; General Baking Company South Philadelphia Disbursement Account, General Baking Company South Philadelphia Plant Deposit Account; General Baking Company West Philadelphia Plant Disbursement Account; General Baking Company West Philadelphia Plant Deposit Account.

Bond Bureau

57-5

Disbursement Accounts

These accounts represent the checking accounts of our bakeries and you will kindly honor all checks drawn on these accounts signed by the authorized signatures duly given you. It is understood in accordance with the enclosed copies of resolutions that in addition to the manager's signature to the checks drawn by these plants, there may be at times checks drawn by the executive officers to be countersigned by the President or Vice President and signed by the Treasurer or Assistant Treasurer which you will also honor. The only items of deposit or credit to this account will be by check from this main office to your order and deposited by our bakery plant in your bank.

Deposit Accounts

These accounts will be used for the deposit of monies received by our bakery plants against which there will be no checking authority except those checks which may be drawn by this main office and signed by the Treasurer or Assistant Treasurer and countersigned by the President or Vice President. Each day the bakery will deliver to your bank the deposit of monies received by them which should be credited to the General Baking Company's respective Deposit Accounts. Each day when delivering a deposit to your bank the bakery's representative will hand your representative a printed post card advice of deposit made which should be signed by you and mailed direct to the executive offices of the General Baking Company, 342 Madison Avenue, New York City.

On Monday of each week it is understood we will receive from you in cash funds the balance of the three deposit accounts as of the close of business the previous Saturday night. As to the method of transfer, we would be very glad to follow your suggestions and in the event that you may wish to make the transfer direct to our New York depositary the American Exchange-Pacific National Bank, 128 Broadway, New York City, we ask that a memoranda of the transactions for the week covering the transfer be mailed direct to this office for purposes of reconciliation with our records.

We believe we have covered the principle subject of the operation of the accounts as mentioned above and if you find that any further explanation may be needed we would be very glad to hear from you.

Very truly yours,

H Clark

Treasurer

AAC.AC

Bond Bread

59-60

[fol. 61] EXHIBIT "C" TO AMENDED BILL

August 22, 1925.

Mr. A. A. Clarke, Treasurer, General Baking Company, 342 Madison Avenue, New York, N. Y.

DEAR SIR:

We believe the following represents a resume of the understanding arrived at between yourself and our Mr. Vance, and which will serve as a basis for the handling of your funds in Philadelphia and surrounding territory.

We will agree to collect your daily deposits from your Philadelphia plants, and deliver weekly payrolls in envelopes to these plants on such days and at such time that will be agreeable to the various managers of said plants. Wherever possible however, we trust that you can arrange for payroll delivery and collections to be made simultaneously.

We will also make up and ship by express payrolls for any of your out of town distributors wherever mutually agreed upon as being an economy to your organization.

It is our understanding that you now have, or contemplate opening distributors in the following places:

Norristown	Wildwood	Camden
Trenton	Pleasantville	Vineland
Ocean City	Clementon	Millville
Burlington	Wilmington	Bridgeton
Atlantic City	Berlin	Sea Isle City
Princeton	Chester	

We will make arrangements with banks of our selection in these different localities to enable your cashiers to make [fol. 62] their regular deposits, and will also care for any additions you may make to the above that come within the Philadelphia zone.

You are to send us a general letter of instructions covering detail of operation, at the time that you send us the usual and necessary certifications of signatures.

In consideration of the above it is our understanding that you will maintain with us two (2) accounts, one to be known as the Deposit Account, and the other to be known as the Disbursement Account. The Deposit Account is for the purpose of handling daily collections. All monies received from your Philadelphia plants and out of town dis-

tributors are to be put into this account, and on Monday morning of each week we will transfer the previous week's total of collections, either through our Federal Reserve correspondent, or through our direct New York correspondent bank, whichever we conclude to be the most effective for your purpose, so that cash funds to the amount of such weekly collections will be to your credit by every Monday at 3 o'clock in the afternoon.

The Disbursement Account is the active checking account for the benefit of the branches in Philadelphia. On Wednesday of each week you will send to this account approximately $25,000. for each of the three (3) plant disbursement accounts. You are to file with us authorized signatures of branch managers and assistant branch managers to cover this account, and it is also understood that in addition to such signatures we are to honor checks that may be drawn from time to time by the executive officers, signed by the Treasurer or Assistant Treasurer, and countersigned by the President or Vice-President.

In connection with the division of responsibility,—in the matter of putting up payrolls,—we assume all responsibil- [fol. 63] ity for errors or discrepancies in any of the envelopes and for the safe delivery of same up to the time it is received and signed for by your representative. In cases where we may ship payrolls by express to any of your out of town distributors, we assume all responsibility up to the time we deliver same to the express company for shipment. As to the collection of deposits,—we assume all responsibility for the safe transfer of all such funds from your plants to our Bank, such deposits to be opened and counted at our Main Office promptly, and any discrepancies found to be reported to you immediately.

Assuring you it is our earnest desire to serve you, we are

Very truly yours, —— ——, Vice-President & Treasurer.

SV:R.

[fol. 64] EXHIBIT "D" TO AMENDED BILL

September 9, 1925.

Mr. Samuel Vance, Jr., Franklin Trust Company, Philadelphia, Pa.

DEAR MR. VANCE:

I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer through the American Exchange-Pacific National Bank of $161,680.42. This transfer was not effected in cash funds, that is without further clearance as you advised me you would do.

On account of leaving the office early I had to postpone writing you until this morning as to the method of receipt by our New York depository. They advise me this morning that they were in receipt of cashier's check of the First National Bank, New York, for the amount as stated above which will not be cleared until this morning.

You will recall that during our conversation you advised me tentatively of your arrangement to transfer through your New York correspondent, The First National Bank and I at that time advised you that I thought it would be effected as it was effected by means of cashier's draft which had to be cleared after its receipt. You will recall that I did not suggest any means by which you could make transfer and allowed you to follow your own suggestions which I am still very pleased to do.

However, I would be pleased on future transfers to have you effect such in cash funds, in other words, without further clearance after its receipt on Monday of each week. [fols. 65-66] I note that it is your intention to be in New York tomorrow, Thursday, and would suggest that if possible you postpone your visit say for a day later as I will be more or less tied up in meetings.

With kindest regards, I am yours,

—— ——, Treasurer.

AAC-FHF.

(Here follows 1 photo, Exhibit "E", side folios 67-68)

4

EXHIBIT "E" TO AMENDED BILL

CAPITAL $ 1 500 000 SURPLUS $ 2 000

FRANKLIN TRUST COMPANY
OF PHILADELPHIA

FIFTEENTH AND CHESTNUT STREETS

ADDISON HARRIS JR. PRESIDENT
DAUPHINEE, VICE PRESIDENT & TREASURER
ARTHUR KITSON JR. VICE PRESIDENT & TRUST OFFICER
CRISPEN, SECRETARY & ASSISTANT TREASURER
CONRO, ASSISTANT TREASURER
DENNIS JONES, ASSISTANT SECRETARY
CARLE JARDEN, ASSISTANT TREASURER
ROBERT L. TABER, ASSISTANT SECRETARY
CHOLMELEY-JONES, ASSISTANT TREASURER
HARRY FERNAN, ASSISTANT TREASURER
HEATH, ASSISTANT TREASURER
STONEHILL, REAL ESTATE OFFICER

DAY AND NIGHT

WEST PHILA OFFICE
52nd & MARKET STS.
FRONT STREET OFFICE
FRONT & MARKET STS.
GERMANTOWN OFFICE
5708 GERMANTOWN AVE.
FRANKFORD OFFICE
FRANKFORD AVE & PAUL

PHILADELPHIA September 11th, 1925.

Exhibit E

Mr.A.A.Clarke, Treasurer,
General Baking Company,
342 Madison Avenue,
New York City, New York.

Dear Mr.Clarke:

Mr.Vance has handed me your letter of September 9th, advising that the transfer was not effected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

We have advised the First National today again that this transfer must be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr.Vance tells me that you understand the situation thoroughly and we appreciate your broad minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again.

With kind personal regards and looking forward to your trip to Philadelphia in the near future, I am

Very truly yours,

ABD-S. Vice President ~~and Treasu~~

67-68

[fol. 69] EXHIBIT "DD" TO AMENDED BILL

September 26th, 1925.

Mr. A. A. Clarke, Treasurer, General Baking Company,
342 Madison Ave., New York, N. Y.

MY DEAR MR. CLARKE:

In connection with the out-of-town collections, there is one condition that at first glance, will be rather confusing, but after it is once understood, and gets into operation, will cause no misunderstanding or difficulty. The cause for this thought lies in the fact that all deposits made in the out-of-town banks, most of which are made after regular banking hours, are credited by the local bank on the next day's business, but we do not receive advices of these deposits until the following day. In other words, a deposit made on a Monday night in the local bank, credited on Tuesday, advice received by us on Wednesday and is credited by us the same day.

Applying this thought to our weekly remittance, means that we can remit only on each Monday morning funds that have been credited on our books at the close of business on the previous Saturday, and this in turn means that the last out-of-town collection that will be included in the Monday remittance would be the one made on Thursday night, credited by the local bank on Friday and advice received by us on Saturday before the close of our books.

While this all appears complicated at first sight, it simply means that the first week's remittance will not be a full week, but thereafter you will receive a full week's collection from the out of town branches, which will include from [fol. 70] a Friday night until the following Thursday night of each previous week.

We will send you every Monday a detailed statement showing collections from all of these out-of-town agencies along with the usual weekly statement of the Philadelphia collections.

Trusting I have made myself clear and with kind personal regards, I am

Very truly yours, —— ——.

SV: H.

(Here follows 1 photo, Exhibit "EE", side folios 71-72)

GENERAL BAKING COMPANY

EXECUTIVE OFFICES

342 MADISON AVENUE

NEW YORK.

September 28, 1925.

33 PLANTS

BALTIMORE, MD.
BOSTON, MASS.
BROOKLYN, N. Y.
BUFFALO, N. Y.
CANTON, OHIO
CLEVELAND, OHIO
DETROIT, MICH.
HARTFORD, CONN.
JERSEY CITY, N. J.
NEWARK, N. J.
NEW HAVEN, CONN.
NEW YORK, N. Y.
NEW ORLEANS, LA.
NORFOLK, VA.
PHILADELPHIA, PA.
PROVIDENCE, R. I.
ROCHESTER, N. Y.
ST. LOUIS, MO.
SPRINGFIELD, MASS.
STEUBENVILLE, OHIO
SYRACUSE, N. Y.
TOLEDO, OHIO
WASHINGTON, D. C.
WATERBURY, CONN.
WHEELING, W. VA.

Mr. Samuel Vance, Jr.,
Franklin Trust Company,
15th & Chestnut Sts.,
Philadelphia, Pa.

Dear Sir:-

We have your letter of September 26th in the matter of out of town collections and note that you will remit on each Monday morning funds that have been credited on your books at the close of business on the previous Saturday, including the local deposits made up to Thursday night and credited by the local bank on Friday, which meets with our approval.

Very truly yours,

GENERAL BAKING COMPANY,

J. L. Dayhoff

Asst. Treasurer.

JLD-FF

Bond Bread

71-7

[fol. 73] IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED BILL OF COMPLAINT AS AMENDED, OF JOHN J. SULLIVAN, SPECIAL DEPUTY, ON BEHALF OF WILLIAM D. GORDON, SECRETARY OF BANKING OF THE COMMONWEALTH OF PENNSYLVANIA, IN POSSESSION OF THE BUSINESS AND PROPERTY OF THE FRANKLIN TRUST COMPANY, A CORPORATION, AND ON HIS OWN BEHALF AS SPECIAL DEPUTY IN CHARGE—Filed December 29, 1932

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in possession of the business and property of the Franklin Trust Company, by John J. Sullivan, Special Deputy as Agent, and John J. Sullivan, Special Deputy in charge, come and file this, their answer to the complainant's amended Bill, as amended, in the above matter, reserving the right of exception to the errors and uncertainties in the complainant's amended Bill, as amended, contained, and for answer thereto and to so much and such parts thereof as defendants, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, and John J. Sullivan, Special Deputy as Agent, are advised are material or necessary to answer, say:

1. The averments of fact in paragraph 1 of said amended Bill, as amended, are admitted to be true.

2. The averments of fact in paragraph 2 of said amended Bill, as amended, are admitted to be true.

3. The averments of fact in paragraph 3 of said amended Bill, as amended, are admitted to be true.

[fol. 74] 4. The defendants admit that an agreement was entered into between Franklin Trust Company and the complainant in August, 1925, under the terms and conditions as averred in plaintiff's amended Bill of Complaint, as amended, as qualified in this Answer.

5. The averments of fact in paragraph 5 of said amended Bill, as amended, are admitted to be true.

6. The averments of fact in paragraph 6 of said amended Bill, as amended, are admitted to be true.

7. The averments of fact in paragraph 7 of said amended Bill, as amended, are admitted to be true.

8. Your deponents qualify the averments of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

The facts alleged in sub-divisions A and B of paragraph 8 of the amended Bill of Complaint, as amended, are admitted. Defendants qualify the allegations in sub-division C of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a "deposit account" in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General [fol. 75] Baking Company in New York or its depository.

The defendants qualify sub-division D of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

It was agreed by and between Franklin Trust Company and General Baking Company that Franklin Trust Company would make arrangements in certain towns in New Jersey, Delaware, Eastern Pennsylvania, and elsewhere, with banks of its selection, said banks to be approved by the complainant, to enable the cashiers of the distributors of the complainant in said towns to make deposits of their moneys (including cash, drafts, and checks) therein, said moneys to be credited in said banks to the account of the Franklin Trust Company, subject only to withdrawal by check of the Franklin Trust Company, a written acknowledgment of the receipt of said moneys to be mailed immediately upon receipt thereof by the outlying banks to the complainant, and a credit advice to be immediately forwarded to the Franklin Trust Company, all money so deposited in said outlying banks to be credited to the complainant's "deposit account" in the Franklin Trust Company, and the proceeds thereof to be forwarded on Monday of each week to the General Baking Company or its depository in New York City.

Defendants qualify sub-division E of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

Defendants have no knowledge that the agreement as therein set forth was entered into by the complainant and the Franklin Trust Company for the sole benefit of the Franklin Trust Company, and if the same is material, demand proof thereof. Defendants aver, moreover, that the allegation that said contract was entered into for the sole [fol. 76] benefit of the Franklin Trust Company is a conclusion of law and therefore irrelevant.

Defendants aver, moreover, that under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and as qualified by this Answer, the Franklin Trust Company was authorized by the General Baking Company to retain and use all sums of money deposited by the General Baking Company in the Franklin Trust Company or the outlying banks, including not only the funds deposited in accordance with the special arrangements as set forth in subdivision E of paragraph 8 of the amended Bill of Complaint, as amended, and as qualified in this Answer, but also all other funds deposited in said "deposit account" and in the outlying banks, in accordance with the agreement of the parties as set forth in subdivisions C and D of the amended Bill of Complaint, as amended, and as qualified in this Answer, for those periods of time during which said funds were in the possession of Franklin Trust Company and/or the outlying banks, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein.

9. Defendants admit the averments of paragraph 9 of the amended Bill of Complaint, as amended, with the qualification that the banks therein listed were selected under the terms and conditions of the agreement set forth in paragraph 8 of the amended Bill of Complaint, as amended, as qualified in this Answer.

9A. Defendants admit that on September 9, 1925, the complainant wrote to the Franklin Trust Company, as set forth in Exhibit "D" attached to the amended Bill of Complaint, as amended, and that on September 11, 1925, the [fol. 77] Franklin Trust Company acknowledged receipt of

said letter, as set forth in Exhibit "E" attached to the amended Bill of Complaint, as amended.

10. The averments of fact in paragraph 10 of said amended Bill, as amended, are admitted to be true.

11. Defendants admit the facts contained in paragraph 11 of the amended Bill of Complaint, as amended, with the qualification that the terms and conditions of the agreement which were performed by the complainant and the Franklin Trust Company were those terms and conditions contained in the agreement as alleged in paragraph 8 of the amended Bill of Complaint, as amended, and as qualified herein.

12. Defendants admit the allegations in paragraph 12 of the amended Bill of Complaint, as amended, with the qualification that they deny that the funds deposited by the complainant, as therein alleged, were deposited at the special request and for the sole benefit of the Franklin Trust Company. Defendants further aver that, in accordance with the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, the General Baking Company authorized the Franklin Trust Company to retain and use all funds deposited by the General Baking Company in the Franklin Trust Company or in the outlying banks, whether deposited in the account known as "Deposit Account" or otherwise, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein.

13. Your deponents admit the facts alleged in subdivisions A, B, and C of paragraph 13 of the amended Bill of Com- [fol. 78] plaint, as amended. Defendants, in reply to subdivision D thereof, admit that the Franklin Trust Company continued to accept moneys from complainant's distributors in Philadelphia, the same to be deposited in the "deposit account" of the complainant and to be forwarded, on Monday and Wednesday of each week, to complainant in New York City or its depository; and for further answer as to the terms and conditions of the contract under which sum moneys were deposited, refer to their allegations in reply to sub-division C of paragraph 8 of the amended Bill of Complaint, as amended. Defendants, in reply to sub-division E of paragraph 13 of the amended Bill of Complaint, as

amended, admit that the correspondent banks selected by the Franklin Trust Company and approved by complainant continued to accept moneys deposited by complainant's distributors in the outlying banks, said funds to be remitted to Franklin Trust Company and credited to the General Baking Company's "deposit account," and the proceeds thereof to be forwarded on Monday and Wednesday of each week to complainant or its depository in New York City; but for further answer qualify the allegations as to the terms and conditions of the agreement entered into between complainant and Franklin Trust Company in the same manner as they have qualified, by their Answer, the allegations contained in sub-division D of paragraph 8 of complainant's amended Bill of Complaint, as amended.

In reply to sub-division F of paragraph 13 of the amended Bill of Complaint, as amended, defendants qualify the facts as therein alleged in the same manner that they have qualified in this Answer similar averments of facts in paragraph 8, sub-division E of the amended Bill of Complaint, as amended.

[fol. 79] 14. Defendants admit the allegations of paragraph 14 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to the agreement, as set forth in paragraph 13 of the amended Bill of Complaint, as amended, the defendants incorporate by reference their reply to said paragraph in this Answer, and with the further qualification that the defendants have no knowledge that the funds deposited with the Franklin Trust Company were so deposited at the oral request of the Franklin Trust Company, and if the same be material, defendants demand proof thereof.

15. Defendants admit the allegations of paragraph 15 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to certain clauses in sub-divisions D and E of paragraph 13 of the amended Bill of Complaint, as amended, paragraph 14, and paragraph 19 of the amended Bill of Complaint, as amended, the defendants incorporate by reference their reply to the corresponding paragraphs in this Answer.

16. Defendants admit the allegations in paragraph 16 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, sub-

division E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

17. The averments of fact in paragraph 17 of said amended Bill, as amended, are admitted to be true.

18. The averments of fact in paragraph 18 of said amended Bill, as amended, are admitted to be true.

19. Defendants admit the allegations in paragraph 19 of the amended Bill of Complaint, as amended, with the quali- [fol. 80] fication that where reference is made to the agreement as set forth in paragraph 13, Clause E, of the amended Bill of Complaint, as amended, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

20. Defendants admit the allegations in paragraph 20 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, subdivision E, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

21. Defendants admit the allegations in paragraph 21 of the amended Bill of Complaint, as amended, with the qualification that where reference is made to paragraph 13, subdivision D, the defendants incorporate by reference their answer to said portion of the amended Bill of Complaint, as amended, as contained in this Answer.

22. The averments of fact in paragraph 22 of said amended Bill, as amended, are admitted to be true.

23. The averments of fact in paragraph 23 of said amended Bill, as amended, are admitted to be true.

24. It is admitted that cash, together with proceeds from the drafts and checks in the amount of $49,590.17, referred to in paragraph 21 of the amended Bill of Complaint, as amended, were mingled with the cash funds of the Franklin Trust Company without first obtaining complainant's specific consent or approval therefor. It is averred that by and under the terms and conditions of the agreement entered [fol. 81] into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer,

consent and approval were given by the General Baking Company to the Franklin Trust Company to divert said funds to and mingle said funds with the general funds of the Franklin Trust Company.

25. The averments of fact in paragraph 25 of said amended Bill, as amended, are admitted to be true.

26. The averments of fact in paragraph 26 of said amended Bill, as amended, are admitted to be true.

27. The averments of fact in paragraph 27 of said amended Bill, as amended, are admitted to be true.

28. The averments of fact in paragraph 28 of said amended Bill, as amended, are admitted to be true.

29. Defendants deny that the complainant is entitled to the equitable relief prayed for in paragraph 29 of the amended Bill of Complaint, as amended, for the reasons as herein set forth. For further answer, defendants aver that whatever rights may be possessed by the complainant herein cannot now be asserted in a separate proceeding, and defendants allege that the proceedings against the Franklin Trust Company, whereby and wherein the Secretary of Banking took possession of the same, having been instituted in the Court of Common Pleas No. 5 of Philadelphia County, as of September Term, 1931, No. 3941, the District Court of the United States for the Eastern District of Pennsylvania does not have jurisdiction to adjudicate and pass upon the facts and circumstances as alleged in the amended complainant's Bill in Equity, as amended. Deponents further [fol. 82] aver that whatever rights may be possessed by the complainant cannot be asserted prior to the audit and adjudication of the account of the Deputy in charge of the Franklin Trust Company of his administration and liquidation of the affairs of said company, at which time and place the complainant may appear and establish its rights in the manner provided by the laws of the Commonwealth of Pennsylvania. Defendants further aver that the facts and circumstances as alleged in the Bill of Complaint and qualified herein do not establish a trust relationship between the complainant and Franklin Trust Company as to the sum of $49,590.17 which was on deposit in the Franklin Trust Company at the date the Secretary of Banking took possession thereof, nor a trust relationship as to the sum of $32,403.26 which sum was collected by the correspondent banks

under the terms and conditions as set forth in the amended Bill of Complaint, as amended (as qualified herein), and was in their possession when the Secretary of Banking took possession of the business and property of the Franklin Trust Company, and is now held in escrow, pending the determination of this action. Defendants aver that under the law, as applied to the facts herein, the complainant is not entitled to a preferred claim against the estate of the Franklin Trust Company now being administered by the Secretary of Banking, but has merely the status of depositor and as such must present its claim at the audit of the account. Defendants further allege that, whatever relationship existed between the complainant and the Franklin Trust Company, the complainant is not entitled to a preferred claim at this time, and that no sums of money should be paid to the complainant until such time as the account of the Secretary of Banking in possession of the business and property of the Franklin Trust Company shall have been audited and the Court of Common Pleas No. 5 of Philadelphia County [fol. 83] shall have ordered distribution of the funds accounted for therein.

Defendants further aver that the complainant has an adequate remedy at law and therefore is not entitled to equitable relief in the premises, and pray that the amended Bill of Complaint, as amended, may be dismissed, with their reasonable costs and charges in this behalf sustained.

William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Company, by John J. Sullivan.

Duly sworn to by John J. Sullivan. Jurat omitted in printing.

[fol. 84] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S REQUESTS FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 20, 1933

To the Honorable, the Judges of the Said Court:

Plaintiff requests the Court to make the following:

Findings of Fact

1. The plaintiff is the General Baking Company, a New York corporation, with principal offices and place of busi-

ness in New York City, New York. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in the Answer thereto, Paragraph 1.)

2. The defendants are William D. Gordon, Secretary of the Pennsylvania Department of Banking, and John J. Sullivan, Special Deputy. (Amended Bill of Complaint as Amended, Paragraph 2, admitted in the Answer thereto, Paragraph 2.)

3. Defendants, at the end of the business day of October 5, 1931, closed and took possession and control of the business and property of the Franklin Trust Company, a Pennsylvania banking corporation, with principal office and place of business at Fifteenth and Chestnut Streets, Philadelphia, Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 2, admitted in the Answer thereto, Paragraph 2.)

4. The amount in this controversy is in excess of $3000, exclusive of interest and costs, and the parties involved are citizens of different states of the United States. (Amended Bill of Complaint as Amended, Paragraph 3, admitted in the Answer thereto, Paragraph 3.)

[fol. 85] 5. Plaintiff, at the times involved in this suit, sold and distributed bread, cakes and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)

6. Plaintiff, at the times involved in this suit, owned and operated thirty-two plants throughout the United States, in the following cities: Baltimore, Maryland; Boston, Massachusetts; Brooklyn, New York; Buffalo, New York; Canton, Ohio; Cleveland, Ohio; Detroit, Michigan; Hartford, Connecticut; Jersey City, New Jersey; Newark, New Jersey; New Haven, Connecticut; New York, New York; New Orleans, Louisiana; Norfolk, Virginia; Philadelphia, Pennsylvania; Providence, Rhode Island; Rochester, New York; St. Louis, Missouri; Springfield, Massachusetts; Steubenville, Ohio; Syracuse, New York; Toledo, Ohio; Washington, District of Columbia; Waterbury, Connecticut; Wheeling, West Virginia. (Amended Bill of Complaint as Amended, Exhibits "B" and "EE.")

7. Plaintiff's main place of business and main bank depository, at the times involved, were in New York City. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)

8. In June, 1925, the Franklin Trust Company sought to enter into an agreement with plaintiff providing for the acceptance by it of cash, checks and drafts from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, for the purpose of forwarding the cash, together with the [fol. 86] proceeds of the checks and drafts, to plaintiff, in New York City. (Amended Bill of Complaint as Amended, Paragraph 4, admitted in the Answer thereto, Paragraph 4.)

9. On June 13, 1925, plaintiff received a letter from the Franklin Trust Company dated June 12, 1925, a copy of which is appended hereto, marked Exhibit "A." (Amended Bill of Complaint as Amended, Paragraph 5, admitted in the Answer thereto, Paragraph 5.)

10. On August 20, 1925, plaintiff sent a letter to the Franklin Trust Company, a copy of which is appended hereto, marked Exhibit "B." (Amended Bill of Complaint as Amended, Paragraph 6, admitted in the Answer thereto, Paragraph 6.)

11. On August 24, 1925, plaintiff received a letter from the Franklin Trust Company, dated August 22, 1925, a copy of which is appended hereto, and marked Exhibit "C." (Amended Bill of Complaint as Amended, Paragraph 7, admitted in the Answer thereto, Paragraph 7.)

12. On August 25, 1925, plaintiff entered into an oral agreement with the Franklin Trust Company with respect to the acceptance of cash, drafts and checks by it from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 8, admitted in the Answer thereto, Paragraph 8.)

13. The terms and provisions of said oral agreement of August 25, 1925, were:

(a) Plaintiff would open a checking account with the Franklin Trust Company and maintain an average balance

[fol. 87] of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a "Disbursement Account."

(b) On Wednesday of each week, plaintiff would forward, from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to plaintiff, or its depository, in New York City; said account to be known as a "Deposit Account."

(d) The Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of plaintiff; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and [fol. 88] the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to plaintiff, or its depository in New York City.

(e) The plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint as Amended, Paragraph 8.)

14. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff would open a checking account, to be known as the "Disbursement Account," with the Franklin Trust Company, and maintain an average balance of not less than $25,000 therein, by forwarding a sum sufficient therefor, on Wednesday of each week, direct from its New York office to the Franklin Trust Company, interest to be paid on this account at the rate of 2 per cent. per annum. (Amended Bill of Complaint as Amended, Paragraph 8, clauses (a) and (b), admitted in the corresponding clauses of Paragraph 8 of the Answer thereto.)

15. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company would accept, from plaintiff's distributors in Philadelphia, cash, also [fol. 89] checks and drafts for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week, to plaintiff or its depository in New York City; said account to be known as the "Deposit Account." (Amended Bill of Complaint as Amended, Paragraph 8, clause (c), admitted in the corresponding clause of Paragraph 8 of the Answer thereto.)

16. The said oral agreement of August 25, 1925, did not provide for the payment of interest by the Franklin Trust Company upon the cash, together with the proceeds from the drafts and checks, accepted by it from plaintiff's distributors for forwarding to plaintiff in New York City. (Amended Bill of Complaint as Amended, Paragraph 8.)

17. The said oral agreement of August 25, 1925, did not permit the Franklin Trust Company to intermingle the funds in plaintiff's Disbursement Account and Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)

18. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d).)

19. The said oral agreement of August 25, 1925, provided, inter alia, that a written acknowledgment of the receipt of said cash, drafts and checks, by each of the said correspond-
[fol. 90] ent banks, would be mailed to plaintiff in New York City immediately upon receipt thereof, and a credit advice sent to the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), admitted in the corresponding clause of Paragraph 8 of the Answer thereto.)

20. The said oral agreement of August 25, 1925, provided, inter alia, that the purpose of the Deposit Account was the handling of daily collections, all moneys received from the Philadelphia plants and out-of-town distributors to be put into this account, and on Monday morning of each week to be transferred either through the Federal Reserve, or New York correspondent bank of the Franklin Trust Company, so that cash funds to the amount of the weekly collections would be to plaintiff's credit by every Monday at three o'clock in the afternoon. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), and Exhibit "C," Page 2, Paragraph 2.)

21. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company, allowing it to use for specified periods of time certain sums from those accepted by it for forwarding to plaintiff, or its depository, in New York City, these sums to be called by plaintiff's check. (Amended Bill of Complaint as Amended, Paragraph 8, clause (e).)

22. The said oral agreement of August 25, 1925, provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City, were never to be
[fol. 91] subject to check, except in those instances where special agreements were entered into between the parties for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint, as Amended, Paragraph 8, clause (e).)

23. The said oral agreement of August 25, 1925, did not provide that the Franklin Trust Company have a right to use the cash, together with proceeds of drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)

24. The clerical work necessitated of the Franklin Trust Company, by the Disbursement Account and the Deposit Account, under said oral agreement of August 25, 1925, was negligible in comparison with that required in the usual checking account.

25. The Franklin Trust Company, pursuant to the terms of said oral agreement of August 25, 1925, selected, with the approval of plaintiff, the following banks in New Jersey, Delaware, and Eastern Pennsylvania, as corresponding banks:

The First Mechanics National Bank of Trenton, Trenton, New Jersey;

West Jersey Trust Company, Parkside Branch, Camden, New Jersey;

The First National Bank, Pleasantville, New Jersey;

Delaware County National Bank, Chester, Pennsylvania;

National Bank of Chester Valley, Coatesville, Pennsylvania;

The Wayne Title & Trust Company, Wayne, Pennsylvania;

Wilmington Trust Company, Wilmington, Delaware;

[fol. 92] The Allentown National Bank, Allentown, Pennsylvania;

Farmers National Bank and Trust Company, Reading, Pennsylvania.

(Amended Bill of Complaint as Amended, Paragraph 9, admitted in Paragraph 9 of the Answer thereto.)

26. On September 9, 1925, plaintiff wrote the Franklin Trust Company a letter, a copy of which is appended hereto, marked Exhibit "D." Said letter stated, inter alia:

"I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer through the American Exchange-Pacific National Bank of

$161,680.42. This transfer was not effected in cash funds, that is without further clearance as you advised me you would do.

* * * * * * *

"You will recall that during our conversation you advised me tentatively of your arrangement to transfer through your New York correspondent, The First National Bank and I at that time advised you that I thought it would be effected as it was effected by means of a cashier's draft which had to be cleared after its receipt. You will recall that I did not suggest any means by which you could make transfer and allowed you to follow your own suggestions which I am still very pleased to do.

"However, I would be pleased on future transfers to have you effect such in cash funds, in other words, without further clearance after its receipt on Monday of each week."

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)

27. On September 12, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 11, [fol. 93] 1925, a copy of which is appended hereto, marked Exhibit "E." Said letter stated, inter alia:

"Mr. Vance has handed me your letter of September 9th, advising that the transfer was not effected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

"We have advised the First National today again that this transfer *must* be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr. Vance tells me that you understand the situation thoroughly and we appreciate your broad-minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again."

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)

28. On September 27, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 26, 1925, a copy of which is appended hereto, marked Exhibit 'DD.'' Said letter contained the following:

''In connection with the out-of-town collections * * * all deposits made in the out-of-town banks * * * are credited by the local bank on the next day's business, but we do not receive advices of these deposits until the following day. In other words, a deposit made on Monday night in the local bank, credited on Tuesday, advice received by us on Wednesday and is credited by us the same day. * * *

[fol. 94] '' * * * you will receive a full week's collection from the out-of-town branches, which will include from a Friday night until the following Thursday night of each previous week.''

(Amended Bill of Complaint as Amended, Paragraph 10, admitted in Paragraph 10 of the Answer thereto.)

29. On September 28, 1925, plaintiff sent a letter to the Franklin Trust Company, a copy of which is appended hereto, marked Exhibit ''EE.'' (Amended Bill of Complaint as Amended, Paragraph 10, admitted in Paragraph 10 of the Answer thereto.)

30. From August, 1925, until August, 1930; the plaintiff and the Franklin Trust Company performed all the terms and conditions of said oral agreement of August 25, 1925. (Amended Bill of Complaint as Amended, Paragraph 11, admitted in Paragraph 11 of the Answer thereto.)

31. Pursuant to the provisions of said oral agreement of August 25, 1925, plaintiff, at the special request and for the sole benefit of the Franklin Trust Company, entered into separate and distinct oral agreements with it, allowing it to use certain funds from the Deposit Account for specified periods of time. The approximate dates of said agreements, the total sums, and the dates when called by plaintiff's checks follow:

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
[fol. 95] Called by three checks:		
One dated March 29, 1928	$140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	200,000.00	440,000.00
June, 1928		$100,000.00
Called by check dated June 29, 1928	100,000.00	100,000.00

(Amended Bill of Complaint, as Amended, Paragraph 12.)

32. The sums which the plaintiff permitted the Franklin Trust Company to segregate from its Deposit Account, and use, were called at the expiration of the specified periods of time by plaintiff's checks.. (Amended Bill of Complaint, as Amended, Paragraph 12, admitted in Paragraph 12, of the Answer thereto.)

33. In August, 1930, plaintiff and the Franklin Trust Company orally agreed to, and did, modify their oral agreement of August 25, 1925, (Amended Bill of Complaint, as Amended, Paragraph 13, admitted in Paragraph 13 of the Answer thereto.)

34. The terms and provisions of said modified agreement of August, 1930, were:

(a) That plaintiff would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000. therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

[fol. 96] (c) That on Wednesday of each week plaintiff would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an

average balance of not less than $25,000.00 in said checking account;

(d) That said Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff or its depository, in New York City; said account to continue to be known as a "Deposit Account."

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by plaintiff, would continue to accept, from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as plaintiff's funds; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday and Wednesday of each week, to plaintiff, or its depository, in New York City.

[fol. 97] (f) That plaintiff might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint, as Amended, Paragraph 13.)

35. The said modified agreement of August, 1930, provided, inter alia, that plaintiff would continue a checking account, to be known as the "Disbursement Account," with

the Franklin Trust Company, and maintain an average balance of not less than $25,000. therein, by forwarding a sum sufficient therefor on Wednesday of each week, direct from its New York office to the Franklin Trust Company, interest no longer to be paid on this account. (Amended Bill of Complaint, as Amended, Paragraph 13, clauses (a), (b), and (c), admitted in the corresponding clauses of Paragraph 13 of the Answer thereto.)

36. The said modified agreement of August, 1930, provided, inter alia, that the Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff, or its depository, in New York City; said [fol. 98] account to be known as the "Deposit Account." (Amended Bill of Complaint, as Amended, Paragraph 13, clause (d), admitted in corresponding clause of Paragraph 13 of the Answer thereto.)

37. The said modified agreement of August, 1930, provided, inter alia, that the correspondent banks in neighboring towns and cities in New Jersey, Delaware and eastern Pennsylvania, selected by the Franklin Trust Company and approved by plaintiff, would continue to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject only to the check of, the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 13, clause (e).)

38. The said modified agreement of August, 1930, provided, inter alia, that the correspondent banks would continue to mail immediately to plaintiff in New York City a written acknowledgment of the receipt of said cash, drafts and checks and send a credit advice thereof to the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 13, clause (e), admitted in corresponding clause of Paragraph 13 of the Answer thereto.)

40. The said modified agreement of August, 1930, provided, inter alia, that plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, continue to enter into separate and distinct oral agreements with the Franklin Trust Company, al-

lowing it to use for specified periods of time certain sums from those accepted by it for forwarding to plaintiff, or its depository, in New York City, on Monday of each week, these sums to be called by plaintiff's check. (Amended Bill of Complaint as Amended, Paragraph 13, clause (f).)

[fol. 99] 41. The said modified agreement of August, 1930 provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City were never to be subject to check, except in those instances where special agreements were entered into between the parties for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint, as Amended, Paragraph 13, clause (f).)

42. The said oral agreement of August, 1930, did not provide that the Franklin Trust Company have a right to use the cash, together with the proceeds of the drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 13.)

43. The ultimate destination of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks, from plaintiff's distributors, was the plaintiff's depository in New York City. (Amended Bill of Complaint as Amended, Exhibits "B" and "C.")

44. The ultimate destination of the cash, together with the proceeds of drafts and checks, accepted by the Franklin Trust Company from plaintiff's distributors in Philadelphia, was plaintiff's depository in New York City.

45. From August, 1930, until October 5, 1931, plaintiff performed all of its obligations under the terms and provisions of said modified agreement of August, 1930. (Amended Bill of Complaint as Amended, Paragraph 14, admitted in Paragraph 14 of the Answer thereto.)

46. Pursuant to the terms and provisions of said modified agreement of August, 1930, plaintiff, at the oral request and for the sole benefit of the Franklin Trust Company, agreed to, and did, allow it to use cash, together with [fol. 100] proceeds of drafts and checks, accepted for forwarding to plaintiff in New York City, during September and part of November, 1930, totaling $100,000, which were called by plaintiff's check, dated November 18, 1930, in the amount of $100,000. (Amended Bill of Complaint as Amended, Paragraph 14.)

47. The Franklin Trust Company, in accordance with the terms and provisions of said modified agreement of August, 1930, delivered in cash on Monday and Wednesday of each week the entire amount of cash, together with the proceeds of the checks and drafts, during the period, August, 1930, to September 30, 1931, except the said $100,000, which plaintiff permitted the Franklin Trust Company to use. (Amended Bill of Complaint as Amended, Paragraph 15, admitted in Paragraph 15 of the Answer thereto.)

48. The plaintiff dealt directly with the correspondent banks with respect to all uncollectible drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 16.)

49. Plaintiff delivered to the correspondent banks the following drafts, cash and checks, for the forwarding of the cash, together with the proceeds of the drafts and checks, to plaintiff, or its depository, in New York City, on the dates and in the amounts specified:

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less Returned Check			20.85
			$30,486.16

[fol. 101] (Amended Bill of Complaint as Amended, Paragraph 16, admitted in Paragraph 16 of the Answer thereto.)

50. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks received on October 3 and 5, 1931, and credit advices thereof were received by the Franklin Trust Company on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 17, admitted in Paragraph 17 of the Answer thereto.)

51. The checks and drafts delivered to the correspondent banks by plaintiff, on October 3 and 5, 1931, were not collected by them until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 18, admitted in Paragraph 18 of the Answer thereto.)

52. On September 26, 1931, plaintiff delivered cash, also drafts and checks, in the amount of $1,917.10, to the Wil-

mington Trust Company, Wilmington, Delaware, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company in Philadelphia, for forwarding to the plaintiff, or its depository, in New York City. (Amended Bill of Complaint as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)

53. Advice of the receipt of said sum of $1,917.10 by the Wilmington Trust Company was not received by the Franklin Trust Company until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)

54. The total amount of cash, drafts and checks delivered by plaintiff to the correspondent banks on September 26, [fol. 102] October 2, 3, and 5, 1931, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company, to be forwarded by it to plaintiff, or its depository, in New York City, was $32,403.26. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)

55. The said sum of $32,403.26 was in the possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow, under order of this court and agreement of counsel, pending the determination of this court as to whom it should be paid. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)

56. Plaintiff delivered to the Franklin Trust Company in Philadelphia, for the purpose of forwarding to plaintiff, or its depository in New York City, the cash, checks and drafts, on the dates and in the amounts as follows:

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17

(Amended Bill of Complaint as Amended, Paragraph 21, admitted in Paragraph 21 of the Answer thereto.)

57. The drafts and checks in the amount of $8,747.50, delivered by plaintiff to the Franklin Trust Company on Oc-
[fol. 103] tober 3, 1931, were not collected by it until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 22, admitted in Paragraph 22 of the Answer thereto.)

58. The Franklin Trust Company did not, as it promised in said modified agreement of August, 1930, forward to plaintiff, or its depository, in New York City, on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03, delivered to it on October 3, 1931, or a total cash sum of $40,642.67. (Amended Bill of Complaint as Amended, Paragraph 23, admitted in Paragraph 23 of the Answer thereto.)

59. The cash together with the proceeds of the drafts and checks, in the amount of $49,590.17, were diverted to, and mingled with, the cash funds of the Franklin Trust Company, without plaintiff's specific consent or approval. (Amended Bill of Complaint as Amended, Paragraph 24, admitted in Paragraph 24 of the Answer thereto.)

60. The cash funds of the Franklin Trust Company were augmented to the extent of $49,590.17 by plaintiff's delivery to the Franklin Trust Company of the said cash, drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 25, admitted in Paragraph 25 of the Answer thereto.)

61. The cash funds of the Franklin Trust Company have been at all times since its acceptance from plaintiff of said cash, drafts and checks, and now are, in excess of the total amount of said cash and the proceeds of said drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 26, admitted in Paragraph 26 of the Answer thereto.)

[fol. 104] 62. There were, and now are, assets of the Franklin Trust Company, in the possession and control of the defendants, sufficient to pay plaintiff and all other preferred claimants in full. (Amended Bill of Complaint as Amended, Paragraph 27, admitted in Paragraph 27 of the Answer thereto.)

63. The correspondent banks were the agents of plaintiff.

64. The Franklin Trust Company did not purchase from plaintiff the drafts and checks accepted for the purpose of collection and forwarding the proceeds thereof to plaintiff, or its depository, in New York City.

65. October 4, 1931, was Sunday.

Conclusions of Law

1. The acceptance by the Franklin Trust Company, from plaintiff's distributors in Philadelphia, of the cash, also the drafts and the checks for collection, for the purpose of forwarding and delivering the cash, together with the proceeds of the drafts and checks, amounting to $49,590.17, to the plaintiff in New York City, created an express trust thereof.

2. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $49,590.17, accepted by the Franklin Trust Company from plaintiff's distributors, on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.

3. There was an equitable assignment to plaintiff of cash funds in the possession of the Franklin Trust Company in the amount of $40,642.67.

[fol. 105] 4. Plaintiff has an equitable lien on the fund of $49,590.17, in defendants' possession, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company, on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.

5. Plaintiff is entitled to a lien upon the assets of the Franklin Trust Company, now in possession and control of the defendants, to the extent of $49,590.17, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City.

6. Upon the failure of the Franklin Trust Company, on October 5, 1931, to forward and deliver to plaintiff the cash sum of $40,642.67, which was accepted by the Franklin

Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City, on October 5, 1931, the Franklin Trust Company became trustee ex maleficio thereof.

7. Full title to, and ownership of, the drafts and checks, amounting to $9,753.18, delivered by plaintiff's distributors on October 2 and 3, 1931, for collection by the Franklin Trust Company, for the purpose of forwarding and delivering the proceeds thereof to plaintiff in New York, remained in plaintiff until the same were collected by defendants on or after October 6, 1931.

8. The Franklin Trust Company was not a purchaser for value of any of the drafts and checks, amounting to $9,753.18, delivered to it for collection by plaintiff's distributors on October 2 and 3, 1931.

[fol. 106] 9. The collection by defendants of the proceeds of the drafts and checks, delivered by plaintiff's distributors to the Franklin Trust Company, on October 2 and 3, 1931, in the amount of $8,747.50, and their subsequent failure to forward and deliver the proceeds to plaintiff in New York City, constituted the defendants trustees ex maleficio for that amount.

10. Under Section 13 of the Pennsylvania Act of June 12, 1931, P. L. 572, plaintiff has a right to the immediate payment of $8,747.50, the proceeds of drafts and checks accepted by the Franklin Trust Company for collection and collected by defendants subsequent to the closing of the Franklin Trust Company.

11. The plaintiff is entitled to immediate payment of said trust funds, in the amount of $49,590.17, with interest, out of the cash funds of the Franklin Trust Company.

12. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were not branch banks of the Franklin Trust Company.

13. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were the agents of plaintiff.

14. The acceptance from plaintiff's agents by the correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania, of cash, also drafts and checks for collection, for the purpose of crediting the same to the Franklin Trust

Company in Philadelphia, for forwarding and delivering the cash, together with the proceeds of the checks and drafts, amounting to $32,403.26, to plaintiff in New York City, [fol. 107] created an express trust thereof.

15. Plaintiff is entitled to the immediate payment of said trust funds in the amount of $32,403.26, with accrued interest thereon.

16. Plaintiff has an equitable lien upon the fund of $32,-403.26, now held in escrow, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks on September 26, October 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company.

17. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $32,403.26, accepted by the correspondent banks from plaintiff's distributors on September 26, October 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company.

18. Full title to, and ownership of the drafts and checks, amounting to $7,163.38, delivered by plaintiff's agents to the correspondent banks on October 2, 3 and 5, 1931, for collection, remained in plaintiff until the same were collected by the correspondent banks on or after October 6, 1931.

19. Neither the correspondent banks nor the Franklin Trust Company was a purchaser for value of said drafts and checks delivered to the former on October 2, 3, and 5, 1931.

20. This Court has jurisdiction of the subject matter of, and the parties to, this suit.

[fol. 108] 21. The defendants are liable for the payment of the costs of this litigation.

Respectfully requested, Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Plaintiff.

Exhibits "A", "B", "C", "D", "DD", "E" and "EE", Attached to Plaintiff's Requests for Findings of Fact and Conclusions of Law

The same as Exhibits "A", "B", "C", "D", "DD", "E" and "E" presented as part of the amended Bill of Complaint as Amended (Filed December 6, 1932) and printed side folios 55 to 72 of this Record.

[fol. 109] IN UNITED STATES DISTRICT COURT

OPINION SUR REARGUMENT—Filed June 8, 1933

KIRKPATRICK, J.:

The amendments allowed by the Court do not affect the issues presented by the original pleadings as the Court understood them. The amendments were allowed so that parties might not be prejudiced upon appeal by averments which they felt might cause misunderstanding. The Court however in deciding the case took the averments of paragraph 24 of the bill and corresponding paragraph of the answer to mean that the mingling of the specific funds in controversy was admitted to have taken place without the specific or express consent or approval of the plaintiff, but the Court was of the opinion that the original agreement contemplated the use by the Trust Company in its general business of all funds deposited and of necessity authorized their commingling with its other general funds.

Upon the re-argument the plaintiff strongly insisted that the Court accepted as a basis for its decision numerous averments in the answer which were no more than conclusions of law or "averments of defendants' interpretation of the exhibits and of the oral contract". This calls for a brief re-examination of the issues, keeping in mind the elementary proposition that upon hearing of bill and answer "the whole answer is to be taken as true; or in other words, the truth of all the well pleaded averments of the answer, whether responsive to the allegations of the bill or in avoidance thereof is admitted, the cause in effect being submitted to the court on the contention that plaintiff is entitled to the [fol. 110] decree prayed for in his bill upon the admissions

and notwithstanding the denials of the answer." 21 C. J. 560.

Now the agreement upon which the plaintiff bases its right, according to the bill, was an oral agreement subsequently orally modified in one or two particulars. It is averred that certain letters passed between the parties and these letters may be considered as evidence bearing upon the intention of the parties in the oral agreement. But there is no averment that the letters were intended as an integration of the agreement and it is obvious that they were not. For the terms of the oral agreement the Court must look to the answer and only such allegations of the bill with regard to the terms as are not denied or modified by the allegations of the answer may be added thereto. Of course, the Court understands that this does not extend to matters of opinion or inference or conclusions of law contained in the answer. But we are dealing with an oral agreement as to which it is not expected that the precise words will be set forth. So that, when the answer says that the parties agreed orally to certain things, unless it clearly appears that these averments are conclusions of law or mere inferences, they must be taken at their face value, namely as statements that, as matters of fact, the parties used the words substantially in accordance with the averment of the answer. If an answer states that "the defendant orally agreed to pay $1000 for an automobile" that is not stating a legal conclusion or inference but is stating a fact.

Now the really vital part of the oral agreement is stated in paragraph 8, sub-section (c) of the bill and the answer to that is as follows "* * * General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia [fol. 111] plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository." It is true that this same paragraph of the

answer refers to the letters passing between the parties ("the exhibits to the amended bill of complaint as amended") but there is no averment or suggestion that these letters constituted the agreement. On the contrary, the statement is that the agreement was oral and the letters are clearly referred to me as evidentiary of the intention of the parties.

The general rule is too well settled to admit of question that in the absence of any special agreement providing for a trust or agency a deposit in a bank to be credited to the depositor creates the relationship of a debtor and creditor. It is agreed of course that this was not an ordinary deposit but that it was made under a special agreement of some kind. Whether it was the purpose of this special agreement to create a trust relationship or whether it was merely to provide certain incidents as to transmission of balances, receipts of deposits, making up pay-rolls, etc., for the convenience of the parties was the matter at issue. The Court did not exclude the letters from its consideration but carefully considered all their terms, as though they had been incorporated into the oral agreement, or as though the agreement had been partly oral and partly written. The Court is still of the opinion that the evidence before it fails to show any intention to deny to the Trust Company the [fol. 112] right to use the funds deposited with it in what was called the deposit account.

The plaintiff has made the point as to the sum of $40,642.67 deposited with the Trust Company on Saturday, October 3, that regardless of any general arrangement, a trust arises because (a) the Trust Company was obligated to deliver this amount in cash to the plaintiff's depository in New York on Monday, October 5, and failed to do so. This argument however only goes to the general intention of the parties. If I thought that the letters relied upon by the plaintiff of September 9 and 11, 1925, meant that the Trust Company was bound to deliver to the plaintiff's depository in New York the identical currency, bills and coin received by it, I would have to revise my view as to the major intention of the parties in the whole transaction. This however was certainly never intended. Nor do I think that there was any intention that currency in specie was to be physically transported from the Trust Company's New York correspondent to the plaintiff's New York de-

pository. The letters of September 9, and 25 refer to "cash funds" and "current funds". All that the plaintiff is insisting upon is that banking arrangements be made so that the amount of money reaching the Trust Company's New York correspondent on Monday be in its depository available to be drawn upon by the afternoon of the same day. The plaintiff objected to the use of cashier's checks on the Trust Company's New York correspondent because they had to be cleared and consequently could not be drawn upon on the same day. Any arrangement which would make the credit balance available on Monday was satisfactory to the plaintiff. I find nothing in this correspondence inconsistent with the intention that the deposit while in the Trust Company's hands should be used for its general banking purposes.

[fol. 113] There are also cases of course which hold that in the absence of any trust agreement, the receipt by a bank of deposits at a time when it knows it is insolvent will create a trust ex maleficio (Ellerbe v. Studebaker Corporation, 21 F. (2d) 993). The trouble with this position is that there is nothing in the bill and answer from which the Court can find that the Trust Company was insolvent on October 3, or at any time prior to the closing of its doors on October 5.

Nor can a trust be implied from the failure of the Trust Company to pay the amount of deposits which it had on hand to the plaintiff's New York depository on Monday, October 5. If the original agreement did not contemplate or create a trust the fact that it has been broken will not accomplish that result. Otherwise any general depositor could turn his general deposit into a trust merely by presenting a check and having payment refused. If the relationship was that of debtor and creditor, the fact that the debtor failed to pay in accordance with the terms of the agreement does not constitute it a trustee.

The Court has carefully considered all the arguments presented in the plaintiff's comprehensive and well-considered brief but adheres to the views expressed in the original opinion and reaffirms the order for the dismissal of the bill.

By the Court.

W. H. Kirkpatrick, J.

[fol. 114] IN UNITED STATES DISTRICT COURT

DECREE—Filed September 8, 1933

This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That plaintiff's bill in equity be dismissed, with costs to be paid by plaintiff.

By the Court.

Kirkpatrick, J.

June 14, 1933.

[fol. 115] IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed September 5, 1933

To the Honorable, the Judges of the Said Court:

Comes now the above-named plaintiff, the appellant herein, by its attorneys of record and assigns as error upon which it will rely the following errors as having intervened in the record, proceedings and decree of the United States District Court for the Eastern District of Pennsylvania, in the above-entitled cause, to wit:

1. The Learned Chancellor erred in finding as a fact that:

"The Trust Company undertook to make up and deliver weekly payrolls in envelopes to the Philadelphia plants, collecting the deposits at the same time, when possible." (Opinion sur Pleadings and Proof.)

2. The Learned Chancellor erred in finding as a fact that:

"The disbursement account was not subject to check, except that the original agreement contemplated that the parties might, from time to time, specially agree to permit the balances in the disbursement account to remain in the Trust Company for longer than semi-weekly periods, in which case at the expiration of such agreed time the funds would be called by check of the plaintiff instead of being sent to it in the usual way." (Opinion sur Pleadings and Proof.)

3. The Learned Chancellor erred in finding as a fact that:

"The parties contemplated and actually made subsequent arrangements by which large amounts of money in [fol. 116] the deposit account were allowed to remain with the Trust Company for considerable periods without anything being said or done as to changing the character of the deposit or the relationship created thereby. * * *" (Opinion sur Pleadings and Proof.)

4. The Learned Chancellor erred in finding as a fact that:

"The general arrangement is not unusual in the case of chain stores and the like, which do their principal banking in one city but have branch stores, which take in large amounts of money, in other places." (Opinion sur Pleadings and Proof.)

5. The Learned Chancellor erred in finding as a fact that:

"Besides supplying its banking facilities for transmission of the plaintiff's money to New York, it undertook the physical work of making the plaintiff's deposits both in Philadelphia and the surrounding territories, as well as that of making up and delivering the plaintiff's payrolls in Philadelphia." (Opinion sur Pleadings and Proof.)

6. The Learned Chancellor erred in finding as a fact that:

"The plaintiff in New York received immediate credit advices of all deposits made to its credit in the deposit account and, probably at once, credited them to its general funds in New York, and there may have been a number of reasons why it was convenient and desirable for it to keep this account intact for semi-weekly remittances." (Opinion sur Pleadings and Proof.)

7. The Learned Chancellor erred in finding as a fact that Sub-Section C, paragraph 8, of the amended answer read: [fol. 117] " * * * General Baking Company, the complainant, agreed to open a 'deposit account' in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants

of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository." (Opinion sur Re-Argument.)

8. The Learned Chancellor erred in finding as a fact that:

"There is no averment or suggestion that these letters [exhibits to the amended bill of complaint, as amended] constituted the agreement." (Opinion sur Re-Argument.)

9. The Learned Chancellor erred in refusing to affirm plaintiff's fifth request for finding of fact. The request and ruling thereon are as follows:

"5. Plaintiff, at the times involved in this suit, sold and distributed bread, cakes and kindred food products in Philadelphia and neighboring towns and cities in New Jersey, Delaware, and Eastern Pennsylvania. (Amended Bill of Complaint as amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)"

The Court ignored the above request.

10. The Learned Chancellor erred in refusing to affirm plaintiff's sixth request for finding of fact. The request and ruling thereon are as follows:

[fol. 118] "6. Plaintiff, at the times involved in this suit, owned and operated thirty-two plants throughout the United States, in the following cities: Baltimore, Maryland; Boston, Massachusetts; Brooklyn, New York; Buffalo, New York; Canton, Ohio; Cleveland, Ohio; Detroit, Michigan; Hartford, Connecticut; Jersey City, New Jersey; Newark, New Jersey; New Haven, Connecticut; New York, New York; New Orleans, Louisiana; Norfolk, Virginia; Philadelphia, Pennsylvania; Providence, Rhode Island; Rochester, New York; St. Louis, Missouri; Springfield, Massachusetts; Steubenville, Ohio; Syracuse, New York; Toledo, Ohio; Washington, District of Columbia;

Waterbury, Connecticut; Wheeling, West Virginia. (Amended Bill of Complaint as Amended, Exhibits 'B' and 'EE.')."

The Court ignored the above request.

11. The Learned Chancellor erred in refusing to affirm plaintiff's seventh request for finding of fact. The request and ruling thereon are as follows:

"7. Plaintiff's main place of business and main bank depository, at the times involved, were in New York City. (Amended Bill of Complaint as Amended, Paragraph 1, admitted in Answer thereto, Paragraph 1.)"

The Court ignored the above request.

12. The Learned Chancellor erred in refusing to affirm plaintiff's eighth request for finding of fact. The request and ruling thereon are as follows:

"8. In June, 1925, the Franklin Trust Company sought to enter into an agreement with plaintiff providing for the acceptance by it of cash, checks and drafts from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware, and Eastern Pennsylvania, for the purpose of forwarding the cash, together with the [fol. 119] proceeds of the checks and drafts, to plaintiff, in New York City. (Amended Bill of Complaint as Amended, Paragraph 4, admitted in the Answer thereto, Paragraph 4.)"

The Court ignored the above request.

13. The Learned Chancellor erred in refusing to affirm plaintiff's ninth request for finding of fact. The request and ruling thereon are as follows:

"9. On June 13, 1925, plaintiff received a letter from the Franklin Trust Company dated June 12, 1925, a copy of which is appended hereto, marked Exhibit 'A'. (Amended Bill of Complaint as Amended, Paragraph 5, admitted in the Answer thereto, Paragraph 5.)"

The Court ignored the above request.

14. The Learned Chancellor erred in refusing to affirm plaintiff's tenth request for finding of fact. The request and ruling thereon are as follows:

"10. On August 20, 1925, Plaintiff sent a letter to the Franklin Trust Company, a copy of which is appended hereto, marked Exhibit 'B'. (Amended Bill of Complaint as Amended, Paragraph 6, admitted in the Answer thereto, Paragraph 6.)"

The Court ignored the above request.

15. The Learned Chancellor erred in refusing to affirm plaintiff's eleventh request for finding of fact. The request and ruling thereon are as follows:

"11. On August 24, 1925, plaintiff received a letter from the Franklin Trust Company, dated August 22, 1925, a copy of which is appended hereto and marked Exhibit 'C'. (Amended Bill of Complaint as Amended, Paragraph 7, admitted in the Answer thereto, Paragraph 7.)"

The Court ignored the above request.

[fol. 120] 16. The Learned Chancellor erred in refusing to affirm plaintiff's twelfth request for finding of fact. The request and ruling thereon are as follows:

"12. On August 25, 1925, plaintiff entered into an oral agreement with the Franklin Trust Company with respect to the acceptance of cash, drafts and checks by it from plaintiff's distributors in Philadelphia and neighboring towns and cities in New Jersey, Delaware, and Eastern Pennsylvania. (Amended Bill of Complaint as Amended, Paragraph 8, admitted in the Answer thereto, Paragraph 8.)"

The Court ignored the above request.

17. The Learned Chancellor erred in refusing to affirm plaintiff's thirteenth request for finding of fact. The request and ruling thereon are as follows:

"13. The terms and provisions of said oral agreement of August 25, 1925, were:

(a) Plaintiff would open a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000.00 on which interest would be paid at the rate of 2 per cent. per annum; said account to be known as a 'Disbursement Account'.

(b) On Wednesday of each week, plaintiff would forward, from its New York office to the Franklin Trust Company, a sum sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(c) The Franklin Trust Company would accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week to plaintiff, or its depository, in New York City; said account to be known as a 'Deposit Account'. [fol. 121] (d) The Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks, in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania, to accept from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of the Franklin Trust Company only, but earmarked as the funds of plaintiff; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be mailed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (c) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (c) above, on Monday of each week, to plaintiff, or its depository in New York City.

(e) The plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (c) and (d) above, for certain periods of time, these sums to be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

18. The Learned Chancellor erred in refusing to affirm plaintiff's fourteenth request for finding of fact. The request and ruling thereon are as follows:

[fol. 122] "14. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff would open a checking account, to be known as the 'Disbursement Account', with the Franklin Trust Company, and maintain an average balance of not less than $25,000.00 therein, by forwarding a sum sufficient therefor, on Wednesday of each week, direct from its New York office to the Franklin Trust Company, interest to be paid on this account at the rate of 2% per annum. (Amended Bill of Complaint as Amended, Paragraph 8, clauses (a) and (b), admitted in the corresponding clauses of Paragraph 8 of the Answer thereto.)"

The Court ignored the above request.

19. The Learned Chancellor erred in refusing to affirm plaintiff's fifteenth request for finding of fact. The request and ruling thereon are as follows:

"15. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company, would accept, from plaintiff's distributors in Philadelphia, cash, also checks and drafts for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday of each week, to plaintiff or its depository in New York City; said account to be known as the 'Deposit Account'. (Amended Bill of Complaint as Amended, Paragraph 8, Clause (c), admitted in the corresponding clause of Paragraph 8 of the Answer thereto."

The Court ignored the above request.

20. The Learned Chancellor erred in refusing to affirm plaintiff's sixteenth request for finding of fact. The request and ruling thereon are as follows:

"16. The said oral agreement of August 25, 1925, did not provide for the payment of interest by the Franklin Trust Company upon the cash, together with the proceeds from the [fol. 123] drafts and checks, accepted by it from plaintiff's distributors for forwarding to plaintiff in New York City. (Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

21. The Learned Chancellor erred in refusing to affirm plaintiff's seventeenth request for finding of fact. The request and ruling thereon are as follows:

"17. The said oral agreement of August 25, 1925, did not permit the Franklin Trust Company to intermingle the funds in plaintiff's Disbursement Account and Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

22. The Learned Chancellor erred in refusing to affirm plaintiff's eighteenth request for finding of fact. The request and ruling thereon are as follows:

"18. The said oral agreement of August 25, 1925, provided, inter alia, that the Franklin Trust Company would select, subject to the approval of plaintiff, certain correspondent banks in neighboring towns and cities in New Jersey, Delaware and Eastern Pennsylvania to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject to the check of, the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d).)"

The Court ignored the above request.

23. The Learned Chancellor erred in refusing to affirm plaintiff's nineteenth request for finding of fact. The request and ruling thereon are as follows:

"19. The said oral agreement of August 25, 1925, provided, inter alia, that a written acknowledgment of the [fol. 124] receipt of said cash, drafts and checks, by each of the said correspondent banks, would be mailed to plaintiff in New York City immediately upon receipt thereof, and a credit advice sent to the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), admitted in the corresponding clause of Paragraph 8 of the Answer thereto.)"

The Court ignored the above request.

24. The Learned Chancellor erred in refusing to affirm plaintiff's twentieth request for finding of fact. The request and ruling thereon are as follows:

"20. The said oral agreement of August 25, 1925, provided, inter alia, that the purpose of the Deposit Account was the handling of daily collections, all moneys received from the Philadelphia plants and out-of-town distributors to be put into this account, and on Monday morning of each week to be transferred, either through the Federal Reserve, or New York correspondent bank of the Franklin Trust Company, so that cash funds to the amount of the weekly collections would be to plaintiff's credit by every Monday at 3 o'clock in the afternoon. (Amended Bill of Complaint as Amended, Paragraph 8, clause (d), and Exhibit 'C', Page 2, Paragraph 2.)"

The Court ignored the above request.

25. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-first request for finding of fact. The request and ruling thereon are as follows:

"21. The said oral agreement of August 25, 1925, provided, inter alia, that plaintiff might, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, enter into separate and distinct oral agreements with the Franklin Trust Company, allowing it to use for specified periods of time certain sums from [fol. 125] those accepted by it for forwarding to plaintiff, or its depository, in New York City, these sums to be called by plaintiff's check. (Admitted Bill of Complaint as Amended, Paragraph 8, clause (e).)"

The Court ignored the above request.

26. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-second request for finding of fact. The request and ruling thereon are as follows:

"22. The said oral agreement of August 25, 1925, provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City, were never to be subject to check, except in those instances where special agreements were entered into between the parties for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 8, clause (e).)"

The Court ignored the above request.

27. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-third request for finding of fact. The request and ruling thereon are as follows:

"23. The said oral agreement of August 25, 1925, did not provide that the Franklin Trust Company have a right to use the cash, together with proceeds of drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 8.)"

The Court ignored the above request.

28. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-fourth request for finding of fact.. The request and ruling thereon are as follows:

"24. The clerical work necessitated of the Franklin Trust Company, by the Disbursement Account and the Deposit [fol. 126] Account, under said oral agreement of August 25, 1925, was negligible in comparison with that required in the usual checking account."

The Court ignored the above request.

29. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-fifth request for finding of fact. The request and ruling thereon are as follows:

"25. The Franklin Trust Company, pursuant to the terms of said oral agreement of August 25, 1925, selected, with the approval of plaintiff, the following banks in New Jersey, Delaware, and Eastern Pennsylvania, as correspondent banks:

The First Mechanics National Bank of Trenton, Trenton, New Jersey;

West Jersey Trust Company, Parkside Branch, Camden, New Jersey;

The First National Bank, Pleasantville, New Jersey;

Delaware County National Bank, Chester, Pennsylvania;

National Bank of Chester Valley, Coatesville, Pennsylvania;

The Wayne Title & Trust Company, Wayne, Pennsylvania;

Wilmington Trust Company, Wilmington, Delaware;

The Allentown National Bank, Allentown, Pennsylvania;

Farmers National Bank and Trust Company, Reading, Pennsylvania.

(Amended Bill of Complaint as Amended, Paragraph 9, admitted in Paragraph 9 of the Answer thereto.)"

The Court ignored the above request.

30. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-sixth request for finding of fact. The request and ruling thereon are as follows:

[fol. 127] "26. On September 9, 1925, plaintiff wrote the Franklin Trust Company a letter, a copy of which is appended hereto, marked Exhibit 'D'. Said letter stated, inter alia:

'I am in receipt of your telegram of September 8th, also your letter of the same date in respect to the transfer through the American Exchange-Pacific National Bank of $161,680.42. This transfer was not effected in cash funds, that is without further clearance as you advised me you would do.

• • • • • • •

'You will recall that during our conversation you advised me tentatively of your arrangement to transfer through your New York correspondent, The First National Bank and I at the time advised you that I thought it would be effected as it was effected by means of cashier's draft which had to be cleared after its receipt. You will recall that I did not suggest any means by which you could make transfer and allowed you to follow your own suggestions which I am still very pleased to do.

'However, I would be pleased on future transfers to have you effect such in cash funds, in other words, without further clearance after its receipt on Monday of each week.'

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)"

The Court ignored the above request.

31. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-seventh request for finding of fact. The request and ruling thereon are as follows:

"27. On September 12, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 11,

[fol. 128] 1925, a copy of which is appended hereto, marked Exhibit 'E'. Said letter states, inter alia:

'Mr. Vance has handed me your letter of September 9th, advising that the transfer was not affected in cash funds in accordance with our understanding. We regret this very much, especially in view of the fact that our instructions to the First National Bank of New York were so specific, that we felt confident a mistake or error, or even a misunderstanding, could not have occurred.

'We have advised the First National today again that this transfer must be made each Monday in current funds so that the General Baking Company can draw on it Monday afternoon. Mr. Vance tells me that you understand the situation thoroughly and we appreciate your broad minded attitude in this matter, as it is good to know that you realize that we had done everything possible to effect the transfer in accordance with our original understanding. However, we feel confident it will not happen again.'

(Amended Bill of Complaint as Amended, Paragraph 9-A, admitted in Paragraph 9-A of the Answer thereto.)"

The Court ignored the above request.

32. The Learned Chancellor erred in refusing to affirm plaintiff's twenty-eighth request for finding of fact. The request and ruling thereon are as follows:

"28. On September 27, 1925, plaintiff received a letter from the Franklin Trust Company, dated September 26, 1925, a copy of which is appended hereto, marked Exhibit 'DD'. Said letter contained the following:

'In connection with the out-of-town collections * * * all deposits made in the out-of-town banks * * * are [fol. 129] credited by the local bank on the next day's business, but we do not receive advices of these deposits until the following day. In other words, a deposit made on Monday night in the local bank, credited on Tuesday, advice received by us on Wednesday and is credited by us the same day. * * *

'* * * you will receive a full week's collection from the out-of-town branches, which will include from a Friday night until the following Thursday night of each previous week.'

(Amended Bill of Complaint as Amended, Paragraph 10, admitted in Paragraph 10 of the Answer thereto.)"

The Court ignored the above request.

33. The earned Chancellor erred in refusing to affirm plaintiff's thirtieth request for finding of fact. The request and ruling thereon are as follows:

"30. From August, 1925, until August, 1930, the plaintiff and the Franklin Trust Company performed all the terms and conditions of said oral agreement of August 25, 1925. (Amended Bill of Complaint as Amended, Paragraph 11, admitted in Paragraph 11 of the Answer thereto.)"

The Court ignored the above request.

34. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-first request for finding of fact. The request and ruling thereon are as follows:

"31. Pursuant to the provisions of said oral agreement of August 25, 1925, plaintiff, at the special request and for the sole benefit of the Franklin Trust Company, entered into separate and distinct oral agreements with it, allowing it to use certain funds from the Deposit Account for specified periods of time. The approximate dates of said agreements, [fol. 130] the total sums, and the dates when called by plaintiff's checks follow:

November and December, 1927		$450,000.00
Called by two checks:		
One dated December 30, 1927	$400,000.00	
One dated December 31, 1927	50,000.00	450,000.00
March and April, 1928		$440,000.00
Called by three checks:		
One dated March 29, 1928	$140,000.00	
One dated April 4, 1928	100,000.00	
One dated April 12, 1928	200,000.00	440,000.00
June, 1928		100,000.00
Called by check dated June 29, 1928	100,000.00	100,000.00

(Amended Bill of Complaint, as Amended, Paragraph 12.)"

The Court ignored the above request.

35. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-second request for finding of fact. The request and ruling thereon are as follows:

"32. The sums which the plaintiff permitted the Franklin Trust Company to segregate from its Deposit Account, and use, were called at the expiration of the specified periods of time by plaintiff's checks. (Amended Bill of Complaint as Amended, Paragraph 12, admitted in Paragraph 12, of the Answer thereto.)"

The Court ignored the above request.

36. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-third request for finding of fact. The request and ruling thereon are as follows:

[fol. 131] "33. In August, 1930, plaintiff and the Franklin Trust Company orally agreed to, and did modify their oral agreement of August 25, 1925. (Amended Bill of Complaint, as Amended, Paragraph 13, admitted in Paragraph 13 of the Answer thereto.)"

The Court ignored the above request.

37. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-fourth request for finding of fact. The request and ruling thereon are as follows:

"34. The terms and provisions of said modified agreement of August, 1930, were:

(a) The plaintiff would continue a checking account with the Franklin Trust Company and maintain an average balance of not less than $25,000. therein;

(b) That no interest would be paid by the Franklin Trust Company on said checking account;

(c) That on Wednesday of each week plaintiff would forward from its New York office to the Franklin Trust Company a sum of money sufficient to maintain an average balance of not less than $25,000.00 in said checking account;

(d) That said Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff or its depository, in New York City; said account to continue to be known as a 'Deposit Account.'

(e) That the said correspondent banks, selected by the Franklin Trust Company and approved by plaintiff, would [fol. 132] continue to accept, from distributors of plaintiff, cash, drafts and checks to be credited to, and subject to the check of, the Franklin Trust Company only, but earmarked as plaintiff's funds; a written acknowledgment of receipt of said cash, drafts and checks by each of said correspondent banks to be failed immediately upon receipt of same to plaintiff in New York City, and a credit advice to be immediately sent to the Franklin Trust Company, whereby all cash, drafts and checks accepted by said correspondent banks were to be credited to the said deposit account referred to in Clause (d) above, for the purpose of the Franklin Trust Company forwarding the cash and the proceeds of the drafts and checks, together with the amount referred to in Clause (d) above, on Monday, and Wednesday of each week, to plaintiff, or its depository, in New York.

(f) That plaintiff might continue, at the special request and for the sole benefit of the Franklin Trust Company, from time to time, to enter into separate and distinct oral agreements with the Franklin Trust Company whereby plaintiff would allow the Franklin Trust Company to use certain sums from those accepted by it for the purpose as set forth in Clauses (d) and (e) above, for certain periods of time; these sums would be called by plaintiff's check only, instead of being forwarded by the Franklin Trust Company. Under such agreements, and no other, would said funds, ever, become subject to check.

(Amended Bill of Complaint, as Amended, Paragraph 13.)"

The Court ignored the above request.

38. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-fifth request for finding of fact. The request and ruling thereon are as follows:

[fol. 133] "35. The said modified agreement of August, 1930, provided, inter alia, that plaintiff would continue a checking account, to be known as the 'Disbursement Account,' with the Franklin Trust Company, and maintain an average balance of not less than $25,000. therein, by forwarding a sum sufficient therefor on Wednesday of each week, direct from its New York Office to the Franklin Trust

Company, interest no longer to be paid on this account. (Amended Bill of Complaint as Amended, Paragraph 13, clauses (a), (b), and (c), admitted in the corresponding clauses of Paragraph 13 of the Answer thereto.)"

The Court ignored the above request.

39. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-sixth request for finding of fact. The request and ruling thereon are as follows:

"36. The said modified agreement of August, 1930, provided, inter alia, that the Franklin Trust Company would continue to accept from plaintiff's distributors in Philadelphia, cash, also drafts and checks for collection, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, on Monday and Wednesday of each week, to plaintiff, or its depository, in New York City; said account to be known as the 'Deposit Account.' (Amended Bill of Complaint as Amended, Paragraph 13, clause (d), admitted in corresponding clause of Paragraph 13 of the Answer thereto.)"

The Court ignored the above request.

40. The Learned Chancellor erred in refusing to affirm plaintiff's thirty-seventh request for finding of fact. The request and ruling thereon are as follows:

"37. The said modified agreement of August, 1930, provided, inter alia, that the correspondent banks in neighbor-[fol. 134] ing towns and cities in New Jersey, Delaware and eastern Pennsylvania, selected by the Franklin Trust Company and approved by plaintiff, would continue to accept from plaintiff's distributors cash, drafts and checks to be credited to, and subject only to the check of, the Franklin Trust Company, but earmarked as plaintiff's funds. (Amended Bill of Complaint as Amended, Paragraph 13, clause (e).)"

The Court ignored the above request.

41. The Learned Chancellor erred in refusing to affirm plaintiff's fortieth request for finding of fact. The request and ruling thereon are as follows:

"40. The said modified agreement of August, 1930, provided, inter alia, that plaintiff might, at the special request

and for the sole benefit of the Franklin Trust Company, from time to time, continue to enter into separate and distinct oral agreements with the Franklin Trust Company, allowing it to use for specified periods of time certain sums from those accepted by it for forwarding to plaintiff, or its depository, in New York City, on Monday of each week, these sums to be called by plaintiff's check. (Amended Bill of Complaint as Amended, Paragraph 13, clause (f).)"

The Court ignored the above request.

42. The Learned Chancellor erred in refusing to affirm plaintiff's forty-first request for finding of fact. The request and ruling thereon are as follows:

"41. The said modified agreement of August, 1930, provided that the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company for forwarding to plaintiff in New York City were never to be subject to check, except in those instances where special agreements were entered into between the parties [fol. 135] for the use thereof by the Franklin Trust Company. (Amended Bill of Complaint as Amended, Paragraph 13, clause (f).)"

The Court ignored the above request.

43. The Learned Chancellor erred in refusing to affirm plaintiff's forty-second request for finding of fact. The request and ruling thereon are as follows:

"42. The said oral agreement of August, 1930, did not provide that the Franklin Trust Company have a right to use the cash, together with the proceeds of the drafts and checks, in the Deposit Account. (Amended Bill of Complaint as Amended, Paragraph 13.)"

The Court ignored the above request.

44. The Learned Chancellor erred in refusing to affirm plaintiff's forty-third request for finding of fact. The request and ruling thereon are as follows:

"43. The ultimate destination of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks, from plaintiffs distributors, was the

plaintiff's depository in New York City. (Amended Bill of Complaint as Amended, Exhibits 'B' and 'C.')''

The Court ignored the above request.

45. The Learned Chancellor erred in refusing to affirm plaintiff's forty-fourth request for finding of fact. The request and ruling thereon are as follows:

''44. The ultimate destination of the cash, together with the proceeds of drafts and checks, accepted by the Franklin Trust Company from plaintiff's distributors in Philadelphia, was plaintiff's depository in New York City.''

The Court ignored the above request.

[fol. 136] 46. The Learned Chancellor erred in refusing to affirm plaintiff's forty-fifth request for finding of fact. The request and ruling thereon are as follows:

''45. From August, 1930, until October 5, 1931, plaintiff performed all of its obligations under the terms and provisions of said modified agreement of August, 1930. Amended Bill of Complaint as Amended, Paragraph 14, admitted in Paragraph 14, of the Answer thereto.)''

The Court ignored the above request.

47. The Learned Chancellor erred in refusing to affirm plaintiff's forty-sixth request for finding of fact. The request and ruling thereon are as follows:

''46. Pursuant to the terms and provisions of said modified agreement of August, 1930, plaintiff, at the oral request and for the sole benefit of the Franklin Trust Company, agreed to, and did, allow it to use cash, together with proceeds of drafts and checks, accepted for forwarding to plaintiff in New York City, during September, and part of November, 1930, totaling $100,000.00, which were called by plaintiff's check, dated November 18, 1930, in the amount of $100,000.00. (Amended Bill of Complaint as Amended, Paragraph 14.)''

The Court ignored the above request.

48. The Learned Chancellor erred in refusing to affirm plaintiff's forty-seventh request for finding of fact. The request and ruling thereon are as follows:

"47. The Franklin Trust Company, in accordance with the terms and provisions of said modified agreement of August, 1930, delivered in cash on Monday and Wednesday of each week the entire amount of cash, together with the proceeds of the checks and drafts, during the period, August, 1930 to September 30, 1931, except the said [fol. 137] $100,000.00 which plaintiff permitted the Franklin Trust Company to use. (Amended Bill of Complaint as Amended, Paragraph 15, admitted in Paragraph 15 of the Answer thereto.)"

The Court ignored the above request.

49. The Learned Chancellor erred in refusing to affirm plaintiff's forty-eighth request for finding of fact. The request and ruling thereon are as follows:

"48. The plaintiff dealt directly with the correspondent banks with respect to all uncollectible drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 16.)"

The Court ignored the above request.

50. The Learned Chancellor erred in refusing to affirm plaintiff's forty-ninth request for finding of fact. The request and ruling thereon are as follows:

"49. Plaintiff delivered to the correspondent banks the following drafts, cash and checks, for the forwarding of the cash, together with the proceeds of the drafts and checks, to plaintiff, or its depository, in New York City, on the dates and in the amounts specified:

Date	Draft or Check	Cash	Total
10/2/31	$174.30	$1,359.92	$1,534.22
10/3/31	6,788.41	19,970.96	26,759.37
10/5/31	200.67	2,012.75	2,213.42
	$7,163.38	$23,343.63	$30,507.01
Less Returned Check			20.85
			$30,486.16

(Amended Bill of Complaint as Amended, Paragraph 16, admitted in Paragraph 16 of the Answer thereto.)"

The Court ignored the above request.

[fol. 138] 51. The Learned Chancellor erred in refusing to affirm plaintiff's fiftieth request for finding of fact. The request and ruling thereon are as follows:

"50. On October 5, 1931, the correspondent banks noted on their books the cash, drafts and checks received on October 3, and 5, 1931, and credit advices thereof were received by the Franklin Trust Company on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 17, admitted in Paragraph 17 of the Answer thereto.)"

The Court ignored the above request.

52. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-first request for finding of fact. The request and ruling thereon are as follows:

"51. The checks and drafts delivered to the correspondent banks by plaintiff, on October 3 and 5, 1931, were not collected by them until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 18, admitted in Paragraph 18 of the Answer thereto.)"

The Court ignored the above request.

53. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-second request for finding of fact. The request and ruling thereon are as follows:

"52. On September 26, 1931, plaintiff delivered cash, also drafts and checks in the amount of $1917.10, to the Wilmington Trust Company, Wilmington, Delaware, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company in Philadelphia, for forwarding to the plaintiff, or its depository, in New York City. (Amended Bill of Complaint as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)"

The Court ignored the above request.

[fol. 139] 54. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-third request for finding of fact. The request and ruling thereon are as follows:

"53. Advice of the receipt of said sum of $1917.10 by the Wilmington Trust Company was not received by the

Franklin Trust Company until on or after October 6, 1931. (Amended Bill of Complaint, as Amended, Paragraph 19, admitted in Paragraph 19 of the Answer thereto.)"

The Court ignored the above request.

55. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-fourth request for finding of fact. The request and ruling thereon are as follows:

"54. The total amount of cash, drafts and checks delivered by plaintiff to the correspondent banks on September 26, October 2, 3 and 5, 1931, for the purpose of forwarding the cash, together with the proceeds of the drafts and checks, to the Franklin Trust Company, to be forwarded by it to plaintiff, or its depository, in New York City, was $32,403.26. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)"

The Court ignored the above request.

56. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-fifth request for finding of fact. The request and ruling thereon are as follows:

"55. The said sum of $32,403.26 was in the possession of the correspondent banks on or after October 6, 1931, and is now deposited in escrow, under order of this court and agreement of counsel, pending the determination of this court as to whom it should be paid. (Amended Bill of Complaint as Amended, Paragraph 20, admitted in Paragraph 20 of the Answer thereto.)"

The Court ignored the above request.

[fol. 140] 57. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-sixth request for finding of fact. The request and ruling thereon are as follows:

"56. Plaintiff delivered to the Franklin Trust Company in Philadelphia, for the purpose of forwarding to plaintiff,

or its depository in New York City, the cash, checks and drafts, on the dates and in the amounts as follows:

Date	Cash	Draft or Check	Total
10/2/31	$594.64	$1,005.52	$1,600.16
10/3/31	40,048.03	8,747.66	48,795.69
	$40,642.67	$9,753.18	$50,395.85
Less credits for returned checks and adjustments			805.68
			$49,590.17

(Amended Bill of Complaint as Amended, Paragraph 21, admitted in Paragraph 21 of the Answer thereto.)''

The Court ignored the above request.

58. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-seventh request for finding of fact. The request and ruling thereon are as follows:

''57. The drafts and checks in the amount of $8,747.50, delivered by plaintiff to the Franklin Trust Company on October 3, 1931, were not collected by it until on or after October 6, 1931. (Amended Bill of Complaint as Amended, Paragraph 22, admitted in Paragraph 22 of the Answer thereto.)''

The Court ignored the above request.

59. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-eighth request for finding of fact. The request and ruling thereon are as follows:

[fol. 141] ''58. The Franklin Trust Company did not, as it promised in said modified agreement of August, 1930, forward to plaintiff, or its depository, in New York City, on Monday, October 5, 1931, the cash sum of $594.64, delivered to it on October 2, 1931, and the cash sum of $40,048.03, delivered to it on October 3, 1931, or a total cash sum of $40,642.67. (Amended Bill of Complaint as Amended, Paragraph 23, admitted in Paragraph 23 of the Answer thereto.)''

The Court ignored the above request.

60. The Learned Chancellor erred in refusing to affirm plaintiff's fifty-ninth request for finding of fact. The request and ruling thereon are as follows:

"59. The cash, together with the proceeds of the drafts and checks, in the amount of $49,590.17 were diverted to, and mingled with, the cash funds of the Franklin Trust Company, without plaintiff's specific consent or approval. (Amended Bill of Complaint as Amended, Paragraph 24, admitted in Paragraph 24 of the Answer thereto.)"

The Court ignored the above request.

61. The Learned Chancellor erred in refusing to affirm plaintiff's sixtieth request for finding of fact. The request and ruling thereon are as follows:

"60. The cash funds of the Franklin Trust Company were augmented to the extent of $49,590.17 by plaintiff's delivery to the Franklin Trust Company of the said cash, drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 25, admitted in Paragraph 25 of the Answer thereto.)"

The Court ignored the above request.

62. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-first request for finding of fact. The request and ruling thereon are as follows:

[fol. 142] "61. The cash funds of the Franklin Trust Company have been at all times since its acceptance from plaintiff of said cash, drafts and checks, and now are, in excess of the total amount of said cash and the proceeds of said drafts and checks. (Amended Bill of Complaint as Amended, Paragraph 26, admitted in Paragraph 26 of the Answer thereto.)"

The Court ignored the above request.

63. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-second request for finding of fact. The request and ruling thereon are as follows:

"62. There were, and now are, assets of the Franklin Trust Company, in the possession and control of the defendants, sufficient to pay plaintiff and all other preferred claimants in full. (Amended Bill of Complaint as

Amended, Paragraph 27, admitted in Paragraph 27 of the Answer thereto.)"

The Court ignored the above request.

64. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-third request for finding of fact. The request and ruling thereon are as follows:

"63. The correspondent banks were the agents of plaintiff."

The Court ignored the above request.

65. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-fourth request for finding of fact. The request and ruling thereon are as follows:

"64. The Franklin Trust Company did not purchase from plaintiff the drafts and checks accepted for the purpose of collection and forwarding the proceeds thereof to plaintiff, or its depository, in New York City."

The Court ignored the above request.

[fol. 143] 66. The Learned Chancellor erred in refusing to affirm plaintiff's sixty-fifth request for finding of fact. The request and ruling thereon are as follows:

"65. October 4, 1931, was Sunday."

The Court ignored the above request.

67. The Learned Chancellor erred in his conclusion of law that

"The parties in this case did not create or contemplate a trust relation as to the deposit account, and that this applies equally to the money directly deposited by the plaintiff's Philadelphia plants and that received through the out-of-town correspondent banks." (Opinion sur Pleadings and Proof.)

68. The Learned Chancellor erred in his conclusion of law that:

"The original agreement contemplated the use by the Trust Company in its general business of all funds depos-

ited and of necessity authorized their commingling with its other general funds." (Opinion sur Re-Argument.)

69. The Learned Chancellor erred in disregarding and treating as meaningless that part of paragraph 8, sub-section c of the Amended Answer reading:

"Defendants qualify the allegations in sub-division c of paragraph 8 of the Amended Bill of Complaint, as Amended, as follows:

'As by reference to the exhibits to the Amended Bill of Complaint as Amended, will more specifically appear.'"

70. The Learned Chancellor erred in his conclusion of law that the following averments in the defendant's Amended Answer were averments of facts:

[fol. 144] "Defendants qualify the allegations in sub-division C of paragraph 8 of the amended Bill of Complaint, as amended, as follows:

'As by reference to the exhibits to the amended Bill of Complaint, as amended, will more specifically appear, your deponents aver that General Baking Company, the complainant, agreed to open a "deposit account" in the Franklin Trust Company, wherein all moneys (including checks, cash and drafts) received by the three Philadelphia plants of the complainant were to be deposited, said deposits to be credited to the complainant, advices of each deposit to be forwarded to the offices of the General Baking Company in New York, and on Monday of each week the balance in the deposit account (as augmented by the funds received under the terms and conditions hereinafter set forth) to be forwarded by the Franklin Trust Company to the General Baking Company in New York or its depository.'" (Paragraph 8.)

"Defendants aver, moreover, that under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, as qualified by this Answer, the Franklin Trust Company was authorized by the General Baking Company to retain and use all sums of money deposited by the General Baking Company in the Franklin Trust Company or

the outlying banks, including not only the funds deposited in accordance with the special arrangements as set forth in sub-division E of paragraph 8 of the amended Bill of Complaint, as amended, and as qualified in this Answer, but also all other funds deposited in said 'deposit account' and in the outlying banks, in accordance with the agreement of the parties as set forth in sub-divisions C and D of the amended Bill of Complaint, as amended, and as qualified in this Answer, for those periods of time during which [fol. 145] said funds were in the possession of the Franklin Trust Company and/or the outlying banks, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein." (Paragraph 8.)

"Defendants further aver that, in accordance with the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, the General Baking Company authorized the Franklin Trust Company to retain and use all funds deposited by the General Baking Company in the Franklin Trust Company or outlying banks, whether deposited in the account known as "Deposit Account' or otherwise, and that there was thus created the relationship of depositor and depository with all the rights and responsibilities implicit therein." (Paragraph 12.)

"It is averred that by and under the terms and conditions of the agreement entered into between the Franklin Trust Company and the General Baking Company, as set forth in the amended Bill of Complaint, as amended, and qualified by this Answer, consent and approval were given by the General Baking Company to the Franklin Trust Company to divert said funds to and mingle said funds with the general funds of the Franklin Trust Company." (Paragraph 24.)

71. The Learned Chancellor erred in his conclusion of law that:

"The general rule is too well settled to admit of question that in the absence of any special agreement providing for a trust or agency a deposit in a bank to be credited to the depositor, creates the relation of a debtor and creditor." (Opinion sur Re-Argument.)

72. The Learned Chancellor erred in refusing to affirm the plaintiff's first request for conclusion of law. The con-
[fol. 146] clusion and the Court's ruling thereon are as follows:

"1. The acceptance by the Franklin Trust Company from plaintiff's distributors in Philadelphia, of the cash, also the drafts and the checks for collection, for the purpose of forwarding and delivering the cash, together with the proceeds of the drafts and checks, amounting to $49,590.17, to the plaintiff in New York City, created an express trust thereof."

The Court ignored the above request.

73. The Learned Chancellor erred in refusing to affirm the plaintiff's second request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"2. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $49,590.17, accepted by the Franklin Trust Company from plaintiff's distributors, on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City."

The Court ignored the above request.

74. The Learned Chancellor erred in refusing to affirm the plaintiff's third request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"3. There was an equitable assignment to plaintiff of cash funds in the possession of the Franklin Trust Company in the amount of $40,642.67."

The Court ignored the above request.

75. The Learned Chancellor erred in refusing to affirm the plaintiff's fourth request for conclusion of law. The
[fol. 147] conclusion and the Court's ruling thereon are as follows:

"4. Plaintiff has an equitable lien on the fund of $49,590.17, in defendants' possession, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company, on October 2 and

3, 1931, for forwarding and delivering to plaintiff in New York City."

The Court ignored the above request.

76. The Learned Chancellor erred in refusing to affirm the plaintiff's fifth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"5. Plaintiff is entitled to a lien upon the assets of the Franklin Trust Company, now in possession and control of the defendants, to the extent of $49,590.17, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City."

The Court ignored the above request.

77. The Learned Chancellor erred in refusing to affirm the plaintiff's sixth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"6. Upon the failure of the Franklin Trust Company, on October 5, 1931, to forward and deliver to plaintiff the cash sum of $40,642.67, which was accepted by the Franklin Trust Company on October 2 and 3, 1931, for forwarding and delivering to plaintiff in New York City, on October 5, 1931, the Franklin Trust Company became trustee ex maleficio thereof."

The Court ignored the above request.

[fol. 148] 78. The Learned Chancellor erred in refusing to affirm the plaintiff's seventh request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"7. Full title to, and ownership of, the drafts and checks, amounting to $9,753.18, delivered by plaintiff's distributors on October 2 and 3, 1931, for collection by the Franklin Trust Company, for the purpose of forwarding and delivering the proceeds thereof to plaintiff in New York, remained in plaintiff until the same were collected by defendants on or after October 6, 1931."

The Court ignored the above request.

79. The Learned Chancellor erred in refusing to affirm the plaintiff's eighth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"8. The Franklin Trust Company was not a purchaser for value of any of the drafts and checks, amounting to $9,753.18, delivered to it for collection by plaintiff's distributors on October 2 and 3, 1931."

The Court ignored the above request.

80. The Learned Chancellor erred in refusing to affirm the plaintiff's ninth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"9. The collection by defendants of the proceeds of the drafts and checks, delivered by plaintiff's distributors to the Franklin Trust Company, on October 2 and 3, 1931, in the amount of $8,747.50, and their subsequent failure to forward and deliver the proceeds to plaintiff in New York City, constituted the defendants trustees' trustees ex maleficio for that amount."

The Court ignored the above request.

[fol. 149] 81. The Learned Chancellor erred in refusing to affirm the plaintiff's tenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"10. Under Section 13 of the Pennsylvania Act of June 12, 1931, P. L. 572, plaintiff has a right to the immediate payment of $8,747.50, the proceeds of drafts and checks accepted by the Franklin Trust Company for collection and collected by defendants subsequent to the closing of the Franklin Trust Company."

The Court ignored the above request.

82. The Learned Chancellor erred in refusing to affirm the plaintiff's eleventh request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"11. The plaintiff is entitled to immediate payment of said trust funds, in the amount of $49,590.17, with interest, out of the cash funds of the Franklin Trust Company."

The Court ignored the above request.

83. The Learned Chancellor erred in refusing to affirm the plaintiff's twelfth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"12. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were not branch banks of the Franklin Trust Company."

The Court ignored the above request.

84. The Learned Chancellor erred in refusing to affirm the plaintiff's thirteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

[fol. 150] "13. The correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania were the agents of plaintiff."

The Court ignored the above request.

85. The Learned Chancellor erred in refusing to affirm the plaintiff's fourteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"14. The acceptance from plaintiff's agents by the correspondent banks in New Jersey, Delaware, and Eastern Pennsylvania, of cash, also drafts and checks for collection, for the purpose of crediting the same to the Franklin Trust Company in Philadelphia, for forwarding and delivering the cash, together with the proceeds of the checks and drafts, amounting to $32,403.26, to plaintiff in New York City, created an express trust thereof."

The Court ignored the above request.

86. The Learned Chancellor erred in refusing to affirm the plaintiff's fifteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"15. Plaintiff is entitled to the immediate payment of said trust funds in the amount of $32,403.26, with accrued interest thereon."

The Court ignored the above request.

87. The Learned Chancellor erred in refusing to affirm the plaintiff's sixteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"16. Plaintiff has an equitable lien upon the fund of $32,403.26, now held in escrow, the amount of the cash, together with the proceeds of the drafts and checks, accepted by the correspondent banks on September 26, Octo-
[fol. 151] ber 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company."

The Court ignored the above request.

88. The Learned Chancellor erred in refusing to affirm the plaintiff's seventeenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"17. There was an equitable assignment to plaintiff of the cash, together with the proceeds of the drafts and checks, in the total amount of $32,403.26, accepted by the correspondent banks from plaintiff's distributors on September 26, October 2, 3 and 5, 1931, for forwarding to plaintiff in New York City via the Franklin Trust Company."

The Court ignored the above request.

89. The Learned Chancellor erred in refusing to affirm the plaintiff's eighteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"18. Full title to, and ownership of the drafts and checks, amounting to $7,163.38, delivered by plaintiff's agents to the correspondent banks on October 2, 3 and 5, 1931 for collection, remained in plaintiff until the same were collected by the correspondent banks on or after October 6, 1931."

The Court ignored the above request.

90. The Learned Chancellor erred in refusing to affirm the plaintiff's nineteenth request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

[fol. 152] "19. Neither the correspondent banks nor the Franklin Trust Company was a purchaser for value of said drafts and checks delivered to the former on October 2, 3 and 5, 1931."

The Court ignored the above request.

91. The Learned Chancellor erred in refusing to affirm the plaintiff's twenty-first request for conclusion of law. The conclusion and the Court's ruling thereon are as follows:

"21. The defendants are liable for the payment of the costs of this litigation."

The Court ignored the above request.

92. The Learned Chancellor erred in his conclusion of law that

"The mere fact that time and banking machinery were required to get these deposits into the general moneys of the Trust Company during which time they may have been susceptible of identification, is unimportant, unless there was something definite to indicate that the parties intended that two different kinds of relationship should successively come into being with regard to those out-of-town deposits, namely, a trust relationship until they reached the deposit account, and a debtor and creditor relationship thereafter. That would be a curious thing to do. * * *" (Opinion sur Pleadings and Proof.)

93. The Learned Chancellor erred in his conclusion of law that

"There is no trust relationship as to either of the funds involved in this suit and the plaintiff is not entitled to a preferred claim against the estate of the Franklin Trust Company, but has merely the status of a depositor." (Opinion sur Pleadings and Proof.)

[fol. 153] 94. The Learned Chancellor erred in entering as a final decree in this cause, on the fourteenth day of June, A. D. 1933, the following:

"This cause came on to be further heard at this term and was argued by counsel, and thereupon, upon consideration thereof, it was ordered, Adjudged and Decreed as follows:

"That plaintiff's Bill in Equity be dismissed, with costs to be paid by plaintiff."

95. The Learned Chancellor erred in dismissing complainant's amended bill of complaint as amended.

Wherefore appellants pray that the decree entered in the said cause in the said District Court of the United States, for the Eastern District of Pennsylvania, be reversed.

Conlen, LaBrum & Beechwood, by (Sgd.) George E. Beechwood.

[fol. 154] In United States District Court

Petition for Appeal—Filed September 8, 1933

To the Honorable J. Whitaker Thompson, Circuit Judge:

The above-named complainant, General Baking Company, feeling aggrieved by the decree rendered and entered in the above-entitled case on the fourteenth day of June, 1933, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Third Circuit for the reason set forth in the assignments of error filed herewith, and prays that the appeal be allowed and a citation be issued as provided by law, and that a transcript of the orders, records, proceedings and documents, upon which the said decree was based, duly authenticated, be forwarded to the United States Circuit Court of Appeals for the Third Circuit, under the rules of such court in such case made and provided.

And your petitioner further prays that a proper order relating to the security required of it to perfect the appeal be made.

Dated at Philadelphia, Pennsylvania, the fifth day of September, 1933.

General Baking Company, by its Attorneys, Conlen, LaBrum & Beechwood, by George E. Beechwood, Attorneys for Petitioner.

[fol. 155] In United States District Court

Order Allowing Appeal—Filed September 8, 1933

On reading the petition of the General Baking Company, complainant in error, for appeal, and the assignments of error, upon due consideration of the record of the said cause:

It Is Ordered that an appeal be allowed from the United States Circuit Court of Appeals for the Third Circuit and the decree entered in the District Court of the United States for the Eastern District of Pennsylvania, as prayed for in said petition; that said appeal and citation thereon be issued, served and returned to the United States Circuit Court of Appeals for the Third Circuit, in accordance with law; that a duly authenticated transcript of the records, proceedings and documents in this matter be forthwith transmitted to the United States Circuit Court of Appeals for the Third Circuit upon condition that the said petitioner and complainant in error give security in the sum of two hundred fifty dollars ($250); that the said complainant in error shall prosecute the said appeal to effect and if the said complainant in error fails to make good its plea, shall answer to the defendant in error for all costs and damages that may be adjudged and decreed on account of said appeal.

The complainant in error now presenting a bond in the sum of two hundred fifty dollars ($250) with the Fidelity and Casualty Company of New York as surety, it is ordered that the same be and hereby is duly approved by the Court.

(Sgd.) J. W. Thompson, J.

[fol. 156] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 157] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, in Possession of Business and Property of Franklin Trust Co., et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

And now, to-wit: this 15th day of March, A. D. 19—, it is ordered that Hon. Guy L. Fake, District Judge for the District of New Jersey, and Hon. —— ——, District Judge for the District of —, be, and he is hereby assigned to sit in above case in order to make a full court.

J. Warren Davis, Circuit Judge.

Endorsements: Order Assigning. Hon. Guy L. Fake, for argument. Rec'd & Filed March 15, 1934. Wm. P. Rowland, Clerk.

[fol. 158] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING CO., Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Appellees

And afterwards, to wit, the 15th day of March, 1934, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable J. Warren Davis, and Honorable J. Whitaker Thompson, Circuit Judges, and Honor-

able Guy L. Fake, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 28th day of September, 1934, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 159] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Defendants-Appellees.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION—Filed September 28, 1934

Before Davis and Thompson, Circuit Judges, and Fake, District Judge

DAVIS, Circuit Judge:

An oral agreement, supplemented, modified or interpreted in part by letters, was entered into on October 25, 1925 by the General Baking Company and the Franklin Trust Company, whereby the Baking Company opened two accounts in the Trust Company, a checking account called the "Disbursement" account and a "Deposit" account.
[fol. 160] The "Disbursement" account was the ordinary checking account, and in this account the Baking Company was to maintain an average balance of $25,000 by means of weekly deposits from the New York Office. From it payroll funds, etc. were to be withdrawn.

The Trust Company was to accept cash, drafts and checks from the three Philadelphia plants. All of these

funds were to be deposited in the "Deposit" account. There was a "Disbursement" and a "Deposit" account for each one of the three places of business.

The plaintiff also made sales through distributors in neighboring towns in New Jersey, Delaware and elsewhere in Pennsylvania and the Trust Company was to select certain of its correspondent banks in these towns which would accept from the distributors in their territory cash, checks and drafts which were to be "ear-marked" according to the bill of complaint, as funds of the plaintiff. As these deposits were made in these banks, they were to notify the Trust Company which would thereupon credit them to the "Deposit" account of the plaintiff.

The cash together with the proceeds of the drafts and checks in this account was to be forwarded by the Trust Company to plaintiff in New York on Mondays and Wednesdays. At first these funds were to be sent only once a week and 2% interest on the "Disbursement" account was to be allowed, but when the change was made and the funds were to be sent to New York twice a week rather than once, interest was not thereafter paid on the account.

On October 5, 1931, the Secretary of Banking of Pennsylvania took over the Franklin Trust Company for liquidation. At that time there was in the "Disbursement" account $36,000, but plaintiff admits that it does not [fol. 161] have a prior claim upon this. There was in the "Deposit" account in the Trust Company $49,930.17. There was also in the various out-of-town correspondent banks cash, drafts and checks for $32,403.26. There was accordingly in the "Deposit" account in the Trust Company and the correspondent banks $82,333.43. Appellant contends that this was a trust fund and that it, therefore, has a prior claim upon it. Appellees freely admit that if this was a trust fund, plaintiff has a prior right to it, but they contend that it was not a trust fund. The District Court sustained this contention.

The appellees while contending that the conclusions of the District Court are right on the question of the trust fund, nevertheless, contend that the court was without jurisdiction. They contend, since the Secretary of Banking had assumed control of the Trust Company and had become a statutory receiver, the State court thereby first acquired jurisdiction over the Trust Company. The Dis-

trict Court held that regardless of what the Secretary might be called, he was not an equity receiver and that the State court did not acquire prior jurisdiction because of the taking over of the Trust Company by the Secretary of Banking. The District Court accordingly held that it first acquired jurisdiction and continues to hold it.

From the decree of the District Court based upon these holdings, this appeal was taken.

We are in full accord with the learned District Judge and for the reasons set forth in his opinions, his decree is affirmed.

A true Copy. Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 162] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, September 28, 1934.

J. Warren Davis, Circuit Judge.

Endorsements: Order Assigning Hon. Guy L. Fake for Argument. Rec'd & Filed March 15, 1934. Wm. P. Rowland, Clerk.

[fol. 163] [File endorsement omitted]

[fol.163-1] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

[Title omitted]

PETITION FOR REARGUMENT—Filed October 26, 1934

Comes now your petitioner, the General Baking Company, Plaintiff-Appellant above named, and respectfully petitions the Court to grant a reargument in the above cause, and in support thereof represents:

1. Plaintiff filed a Bill in equity to impress a trust on $81,993.43. This Court held that there was no trust and affirmed an order of the lower Court dismissing the Bill. In so doing, it appears that the Court must have inadvertently overlooked Plaintiff's right to the sums of $15,736.74 and $25,239.88, regardless of the existence of a trust. Plaintiff's right to recover the $15,736.74 is derived from the Pennsylvania Bank Collection Act of June 12, 1931, P. L. 568, as interpreted by the Courts of Pennsylvania, and the decision [fol. 163-2] of the United States Supreme Court interpreting and applying a similar statute of a sister State. Plaintiff's right to recover the $25,239.88 is based upon a decision of the Supreme Court of the United States. It appears that neither this Court, nor the lower Court, considered the Pennsylvania Bank Collection Act, or the principles involved, although covered by Assignments of Error and discussed at length in the appellant's brief (see pp. 63 to 68). It also appears that this Court did not consider the case of Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50, in respect to Plaintiff's right to the $25,239.88 in outlying banks in Eastern Pennsylvania, New Jersey and Delaware.

2. To eliminate any possible doubt in the premises, your petitioner, for the purpose of this petition accepts the decision of the Court that no trust existed. Irrespective of this, Plaintiff is entitled to recover the sums referred to above.

3. Plaintiff averred that Defendant, William D. Gordon, Secretary of the Department of Banking, at the close of the business day of October 5, 1931, closed and took possession and control of the business and property of the Franklin

Trust Company (R. p. 38, Par. 2). Defendant admitted this (R. p. 73, Par. 2). Plaintiff averred that on October 3 and 5, 1931, drafts and checks totalling $6989.08 were delivered to the banks in Eastern Pennsylvania, New Jersey and Delaware (R. p. 49, Par. 16). Defendant admitted this (R. p. 79, Par. 16). Plaintiff averred that drafts and checks delivered by Plaintiff to the correspondent banks on October 3 and 5, 1931, were not collected by the banks until on or after October 6, 1931 (R. p. 50, Par. 18). Defendant admitted this (R. p. 79, Par. 18). Plaintiff averred that Defendant delivered to the Franklin Trust Company on [fol. 163-3] October 3, 1931, checks and drafts totalling $8747.66 (R. p. 50, Par. 21). Defendant admitted this (R. p. 80, Par. 21). Plaintiff averred that the checks and drafts delivered by Plaintiff to the Franklin Trust Company on October 3, 1931, were not collected by the bank until on or after October 6, 1931 (R. p. 51, Par. 22). Defendant admitted this (R. p. 80, Par. 22). The Defendant has unqualifiedly admitted of record that he received the sum of $15,736.74 representing the proceeds of drafts and checks collected by him after the Franklin Trust Company had ceased business and its doors closed at his direction.

(A) Assuming the General Baking Company was an ordinary depositor it is entitled to the return of the proceeds of these drafts and checks under the plain language of the statutes of Pennsylvania and the decisions of Pennsylvania Courts. The Franklin Trust Company was not a purchaser for value of the said drafts and checks but a collecting agent.

The pertinent provisions of the Pennsylvania Bank Collection Act of June 12, 1931, P. L. 568, are as follows:

"Except as otherwise provided by agreement * * * *the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor.* * * *" (Section 2.)

"Where a deposited item is payable to bearer or indorsed by the depositor in blank or by special indorsement, the fact that such item is so payable or indorsed shall not change the relation of agent of the bank of deposit to the depositor. * * *" (Section 4, Clause 3.)

"It shall be the duty of the initial or any subsequent agent collecting bank to exercise ordinary care in the col-

[fol. 163-4] lection of an item, and when such duty is performed such agent bank shall not be responsible if, for any cause, payment is not received in money or an unconditional credit given on the books of another bank, which such agent bank has requested or accepted. An initial or subsequent agent collecting bank shall be liable for its own lack of exercise of ordinary care but shall not be liable for the neglect, misconduct, mistakes, or defaults of any other agent bank or of the drawee or payor bank." (Section 5.)

"*Where an agent collecting bank,* other than the drawee or payor, *shall fail or be closed for business as above, after having received in any form the proceeds of an item or items entrusted to it for collection, but without such item or items having been paid or remitted for by it either in money or by an unconditional credit given on its books or on the books of any other bank,* which has been requested or accepted so as to constitute such failed collecting or other bank debtor therefore, *the assets of such agent collecting bank which has failed or been closed for business as above shall be impressed with a trust in favor of the owner or owners of such item or items for the amount of such proceeds, and such owner or owners shall be entitled to a preferred claim upon such assets,* irrespective of whether the fund representing such item or items can be traced and identified as part of such assets or has been intermingled with or converted into other assets of such failed bank." (Section 13, Clause (c).) (Italics ours.)

In the case of In re United Security Trust Company, 19 D. & C. (Pa.) 303, the court stated the facts as follows:

"On Saturday, October 3, 1931, between 12 o'clock and 1 P. M., the First Penny Savings Bank Philadelphia deposited in its checking account with the United Security Trust Company the sum of $4,006.24, which deposit con- [fol. 163-5] sisted of checks on various banking institutions and checks drawn on the Treasurer of the United States of America; that $1,850.94 of these checks were drawn on banks which were not members of the Philadelphia Clearing House Association, and the balance of the checks in the sum of $2,155.30 were drawn on banks which were members of the Philadelphia Clearing House Association; that the checks which were drawn on banks which were not mem-

bers of the Philadelphia Clearing House Association were deposited by the United Security Trust Company on October 3, 1931, with the Philadelphia National Bank, which bank gave the United Security Trust Company credit in the amount of the said checks, to wit, $1,850.94, on October 3, 1931, on which day the United Security Trust Company was indebted to the Philadelphia National Bank in the sum of $548,666.50.

"The United Security Trust Company never opened for business on Monday, October 5, 1931, and possession of the same was taken by the Secretary of Banking of the Commonwealth of Pennsylvania. After possession was so taken, the checks aggregating $2,155.30, drawn on the banking institutions which were members of the Philadelphia Clearing House Association were not put through the Philadelphia Clearing House but were collected at the various banks on which they were drawn on October 5, 1931, by payments of cash against the checks, and subsequent to the closing of the trust company the First Penny Savings Bank Philadelphia assigned its claim to the Western Saving Fund Society of Philadelphia.

"While the deposit was made on Saturday, October 3, 1931, it was entered in the depositor's bank book as of October 5, 1931, and on the records of the bank the deposit was entered as of October 3, 1931."

The court continued:

"As to the $2,155.30 in checks which were in the United Security Trust Company at the time the Secretary of Bank-[fol. 163-6] ing took possession of the said trust company on October 5, 1931, it is clear that the claimant was entitled to have them or their proceeds returned to it.

"Section 2 of the Act of June 12, 1931, P. L. 568, provides as follows:

'Except as otherwise provided by agreement and except as to subsequent holders of a negotiable instrument payable to bearer or indorsed specially or in blank, where an item is deposited or received for collection, the bank of deposit shall be agent of the depositor for its collection and each subsequent collecting bank shall be subagent of the depositor —and any credit given by any such agent or subagent bank therefor shall be revocable until such time as the proceeds are received in actual money or an unconditional credit given

on the books of another bank, which such agent has requested or accepted.'

"Under the express provisions of the aforesaid act the United Security Trust Company, on October 3, 1931, became the agent of the depositor for the collection of the checks deposited and the credit given to the depositor was revocable until the time *of* the proceeds were received in actual money or unconditional credit, and it was also well settled prior to the enactment of the Act of 1931 that the bank was the agent of the depositor until the checks were actually collected; Hazlett v. Commercial N. Bank, 132 Pa. 118; National Bank of Phoenixville v. Bonsor, 38 Pa. Superior Ct. 275; New York Hotel Statler Company, Inc., v. Girard National Bank, 89 Pa. Superior Ct. 537.

"The status of every depositor in the bank was fixed as of the time when the Secretary of Banking took possession of the bank on the morning of October 5, 1931. This is the rule with reference to all receivers and bankruptcy proceedings: Blum Brothers v. Girard National Bank et al., 248 [fol. 163-7] Pa. 148; Chambersburg Trust Co. v. Alexander, 102 Pa. Superior Ct. 158; Dean and Son's Appeal, 98 Pa. 101; McDonald v. Williams, 174 U. S. 397.

"At the time the Secretary of Banking took possession of the property of the United Security Trust Company, therefore, as to the $2,155.30 of checks which remained at the trust company at that time, as they had not as yet been collected, the bank at that time was the agent of the depositor for their collection, and the credit that was given to the depositor was revocable, the checks belonging to the claimant could easily be segregated and nothing that was done by the agent in the charge of the bank after the Secretary of Banking took possession could affect the legal status of the claimant.

"Section 13 (a) of the Act of 1931 provides as follows: 'When the drawee or payor, or any other agent collecting bank, shall fail or be closed for business by the Secretary of Banking, or by action of the board of directors, or by other proper legal action, after an item shall be mailed or otherwise entrusted to it for collection or payment but before the actual collection or payment thereof, it shall be the duty of the receiver or other official in charge of its assets to return such item, if same is in his possession, to

the forwarding or presenting bank with reasonable diligence.'

"Under this section of the act, inasmuch as the trust company was closed for business by the Secretary of Banking before the actual collection of the $2,155.30 of checks, it was the duty of the receiver, since they were in his possession, to return them to the claimant. These rights of the claimant were fixed at the time the Secretary of Banking took possession and could not be affected by any act of the receiver contrary to the express provisions of the act, and the fact that the agent in charge of the trust company subse- [fol. 163-8] quently collected this money can have no effect on the status of the claimant, which was fixed at the time the Secretary of Banking took possession. The Secretary of Banking is a public officer, and when he takes charge of a bank it is imperative that he conduct its affairs in accordance with statutory provisions, and under the express wording of the above section of the act the claimant was entitled to have checks which were still in the bank uncollected returned to it.

"Even before the enactment of the Act of 1931, it was well settled, both in our State and in other jurisdictions, where the relation between the depositor and the bank, until the checks are collected, is that of principal and agent, that when there are uncollected checks in the possession of the Secretary of Banking at the time when he takes charge of the bank, the depositor is entitled to a return of the checks or the funds which are subsequently collected.

"In the case of Eppinger, Executor, v. Allen et al., Trustees, 8 D. & C. 321, where this very question came before our courts, and which was decided before the enactment of the Act of 1931, the court held as follows:

'When a bank, which becomes insolvent or which makes an assignment for the benefit of creditors or goes into the hands of a receiver, has at that time uncollected paper on hand, its authority to collect is thereby terminated and the depositor is entitled to a return of the paper; if, instead it is actually collected, the depositor is entitled to a return of the proceeds: Brady, The Law of Bank Checks (1915), S. 214; Selover, Bank Collections (1901), S. 32; 2 Michie, Banks and Banking (1913), S. 166. Numerous cases are to be found in 2 Paton's Digest (1926), S. 1598a. In 1 Morse

on Banks and Banking (5th ed.), S. 249a, the rule is stated: "After a bank has suspended, it ought not to receive pay-
[fol. 163-9] ments upon business paper previously deposited with it for collection; or at least not in such a manner that the money so received by it will pass into its general assets, and the owner of the paper will be placed in the position of one of its creditors, entitled only to take his dividend. * * * Proceeds received after the bank becomes insolvent are held in trust and may be recovered in full.'

'Such is the rule of the Federal courts. See Beal v. Somerville, 50 Fed. Repr. 647 (C. C. A., 1st Cir.); Richardson v. Denegre, 93 Fed. Repr. 572 (C. C. A., 5th Cir.); Richardson v. New Orleans Coffee Co., 102 Fed. Repr. 785 (C. C. A., 5th Cir.); In re Jarmulowsky, 249 Fed. Repr. 319 (C. C. A., 2d Cir.); In re Gubelman, 10 Fed. Repr. (2d) 926 (C. C. A., 2d Cir.), also 10 Fed. Repr. (2d) 935.'

"In the cases of Hackett v. Reynolds, Lamberton & Co., 114 Pa. 328, First National Bank of Clarion v. Gregg & Co., 79 Pa. 384, and Jones & Co. v. Milliken & Son, 41 Pa. 252, it was decided by our Supreme Court that a depositor could recover from a subagent bank the proceeds of commercial paper which had been forwarded to it by another bank for collection, where the forwarding bank became insolvent after it forwarded the paper to the subagent bank but before the subagent bank had received payment; and in the case of Crane, Parris & Company v. The Fourth Street National Bank, 173 Pa. 566, a similar recovery was permitted under similar circumstances from the payee bank.

"In the case of Freiberg et al. v. Stoddard, Assignee, 161 Pa. 259, 266, it was said that:

"* * * If at the time of the assignment the plaintiff's notes had been found by the assignee uncollected, he should have returned them. If a draft or bond or a specific package of money received in payment of the notes had been found [fol. 163-10] among the assets coming into his hands, it should have been turned over to the plaintiff.'

"The same principle of law is stated in 7 C. J. 625, as follows:

'The insolvency of a bank at once terminates its authority to proceed further and if collections are afterwards made,

or those previously undertaken are completed the proceeds are held in trust for the owners.'

"In 3 R. C. L. 635, the same principle of law is stated in the following language:

'It is upon this principle that if a collection has not been completed before the collecting bank becomes insolvent any money thereafter received is the property of the principal and no change of the relation of principal and agent to that of creditor and debtor can be effected after the insolvency of the bank. And so where paper sent to a bank for collection is not paid before the insolvency of the bank it remains as against its assignee for the benefit of creditors or in bankruptcy the property of the customer, and does not pass to the assignee or receiver; and if it is collected by the assignee or receiver he is bound to account to the customer therefor.'

"In the case of Balbach and others v. Frelinghuysen, Receiver, etc., 15 Fed. 675, a similar question came before the Circuit Court of the District of New Jersey where a check was deposited on Saturday and the bank failed to open on Monday, and there was an uncollected check in the bank at the time when the receiver took possession. The court there used the following language:

'It was, perhaps, a gratuitous act for the bank examiner to send it forth for collection. • • •

'The naked question is whether, under such circumstances, [fol. 163-11] the right to recall the check remained with the depositors, or whether it had passed beyond their reach. I see no reason, in principle, which should not allow them to recall it. It was their property until collected. If the bank had continued business, and the check had been returned unpaid, it would have been charged up to their account and handed back to them.' (Page 684.)

"A similar situation, where checks were deposited on Saturday afternoon and the bank closed shortly thereafter, is that of Beal, Receiver v. City of Somerville, 50 Fed. 647, and there also the Circuit Court of Appeals decided that the depositor was entitled to the return of the checks or money.

"To the same effect are the cases of In re State Bank, Insolvent, 56 Minn. 119; Manufacturer's National Bank v.

Continental Bank, 148 Mass. 553, 2 L. R. A. 699, where the court held (Page 559):

'At that time the right of the Fidelity National Bank to mingle with its own funds the proceeds of a check collected for the plaintiff had terminated'; and Alleman et al. v. Sayre, Receiver, et al., 79 W. Va. 763, 91 S. E. 805, L. R. A. 1917D 1002.

"In some jurisdictions in which a contrary view has been taken the decisions are mostly based on the fact that in those jurisdictions it has been held that there is no agency relationship between a depositor and its bank until the funds are collected. The claimant is therefore entitled to recover the $2,155.30 in full.

"The exceptions are sustained as to the claim of $2,155.30, and exceptant is allowed priority in that sum."

It will be noted that the United Security Trust Company failed on October 3, 1931 and the Franklin Trust Company [fol. 163-12] on October 5, 1931. It will also be observed that the Secretary of the Department of Banking, William D. Gordon, was the defendant in that case as well as the defendant in the instant case. At the time these cases arose, and all other cases in which closed Pennsylvania banks were involved, the Secretary of the Department of Banking took the position that the banks were purchasers for value of depositors' checks. However, the Lower Court of Pennsylvania, in interpreting the Bank Collection Act and decisions of the Supreme Court of Pennsylvania, ruled against the defendant. The defendant took no appeal from that decision. It may be assumed therefore that he has conceded its correctness.

In the case at Bar, counsel for the plaintiff urged the Lower Court and this Court to give effect to the same statute. Nevertheless, both the Lower Court and this Court have either refused (by ignoring it) to give effect to it, thereby nullifying it, or have inadvertently overlooked this phase of the case.

It is inconceivable that this Court would deprive the plaintiff of its clear right under the statute when the Pennsylvania Courts interpreting and applying the statute and the law of Pennsylvania gives to other parties such a right. The petitioner cannot believe this Court intended to set

aside and treat as if non-existent, this statute which governs the rights of the parties with respect to the $15,736.74.

Inasmuch as this Court and the Lower Court did not refer to, or discuss, this statute or this phase of the case, it would appear that the Court considered only the question whether or not there was a trust agreement between the plaintiff and the Franklin Trust in respect to the entire sum of $81,993.43 and that the Court did not consider the plaintiff's right to the $15,736.74 and $25,239.88 irrespective of any trust agreement.

[fol. 163-13] Under the plain language of this Act the Franklin Trust Company was an agent collecting bank and the proceeds of the checks and drafts must be returned at once to plaintiff. Moreover, the decisions of the Pennsylvania and federal courts, codified by this Act, reach the same conclusion:

Bank of Wesleyville v. E. D. Rose, 85 Pa. Superior Ct. 52 (1925);

Jacobs v. Mohnton Trust Co., 299 Pa. 527 (1930);

Washington Loan & Banking Co. v. Fourth Nat. Bank of Macon et al., 38 F. (2d) 772 (C. C. A., 5th, 1930).

In Bank of Wesleyville v. Rose, supra, the court stated on page 57:

"It is familiar law that 'when a bank credits a customer with the amount of a check, endorsed by him in blank, deposited in his account, the bank does not in the absence of a special agreement from this fact standing alone become a holder of the paper for value; *the title to the check remains in the depositor.* * * * *The relation arising from such a transaction, as between the bank and the depositor, is that the former becomes the agent of the latter for the purpose of collection'*: * * * In Hazlett v. Commercial Bank, 132 Pa. 118, 125, Chief Justice Paxson said: 'The mere fact that the collecting bank credited him (the depositor) with the check as cash did not alter that relation. This is done daily,—indeed, it is almost the universal usage to credit such collections as cash, unless the customer making such deposit is in weak credit.' " (Italics ours.)

This case was cited with approval in Jocobs v. Mohnton Trust Co., supra (299 Pa. 527, 530).

In Washington Loan & Banking Co. v. Fourth Nat. Bank of Macon, supra, the Court said at pages 774 and 775:

[fol. 163-14] "The relationship of a bank to a draft or check turned over to it by a customer depends on their contract*ing* respecting it. * * * Statutes and local and general banking customs may influence or control the contract.

* * * * * * *

"We think it plain that notwithstanding the blank endorsement of the draft * * * and the immediate entry of a credit to the Washington Bank * * * that it was not their understanding that the Macon bank had at once bought the drafts and credited the proceeds on general deposit. The letter of transmittal expressly stated that each draft was indorsed for collection first, and for credit after its collection, or prompt return if unpaid. *Until collection the ownership of the draft remained in the Washington bank, the Macon bank and its correspondents being only agents for the collection,* and after collection the proceeds remained the property of the Washington bank until finally passed to the latter's checking account by the Macon Bank." (Italics ours.)

The Supreme Court of the United States, in the case of Dakin v. Bally (78 L. Ed. 95), has conclusively ruled in favor of plaintiff. In that case the Receiver for the First National Bank of St. Petersburg sued the Peoples' Bank of Clearwater. The defendant pleaded a set-off by virtue of delivery by the St. Petersburg Bank to the Clearwater Bank of four drafts, drawn on a third bank, which were dishonored. The plaintiff replied that certain checks drawn on the St. Petersburg Bank and other banks in St. Petersburg, were deposited with the Clearwater Bank for collection and were forwarded by it to the St. Petersburg Bank for collection and remittance and that the four drafts in question were in payment thereof. The Supreme Court held that title to and ownership of these checks did not pass to the Clearwater Bank or to the St. Petersburg Bank but [fol. 163-15] that it remained in the depositors until they were actually paid in cash or its equivalent; that the Clearwater Bank acted as agents of the depositors in forwarding the checks to the St. Petersburg Bank; that the depositors had a right of action against the St. Petersburg Bank for

any default in collection and remittance; and that, therefore, the Clearwater Bank, as agent, could not set-off a claim or right existing in its depositors against the St. Petersburg Bank.

The Court said on pages 98, 99:

"A statute of Florida, however, requires of the bank of deposit only due diligence in the forwarding of such a check for collection and in the absence of negligence conditions liability for the amount of the check on receipt of final payment from the collecting bank. The parties are presumed to have contracted with reference to this statute (Federal Reserve Bank v. Malloy, 264 U. S. 160, 68 L. ed. 617, 44 S. Ct. 296, 31 A. L. R. 1261), and the situation is as if they had expressly agreed that the Clearwater bank was to act as agent only and was not to become the debtor of the depositors unless and until it had received actual and final payment of the checks. Since, then, the Clearwater bank acted as the agent of depositors in forwarding checks to the St. Petersburg bank, the depositors have a right of action against the latter for any default in collection or remittance. Federal Reserve Bank v. Malloy, supra.; see also Miami v. First Nat. Bank (C. C. R. 5th) 58 F. (2d) 561.

"* * *What, then, was the situation as disclosed by the record, when the St. Petersburg bank closed its doors? That bank, as sub-agent for the Clearwater bank's depositors, had made collection and sent the drafts for the amount to the Clearwater bank. It is incorrect to say that the St. Petersburg bank paid the amounts collected by forwarding drafts to the Clearwater bank, or that the Clearwater bank upon receipt of the drafts was bound to accept them as [fol. 163-16] payment and its depositors were likewise thereupon bound to treat the agency of the Clearwater bank and that of the St. Petersburg bank as ended and the relation of debtor and creditor as established between them and the Clearwater bank. Equally inaccurate is the assertion that receipt and retention of the drafts required the Clearwater bank, unless its depositors asserted ownership of them, at once to credit the depositors with the amount of the items represented by the drafts. The bank was not bound to assume the relation of debtor until, in the words of the statute, it had received final payment, i. e., cash or its equivalent, and we should not presume that it did so."

It is submitted that under the Pennsylvania Bank Collection Act and the cited cases, plaintiff is entitled to the $15,736.74.

(b) Upon Insolvency, the Franklin Trust Company Lost Its Right to Receive the $25,239.88 in the Outlying Banks, and Plaintiff Became Entitled to Immediate Possession Thereof.

(Assignments 84, 85, 87, 88, 92, 93, 94, 95.)

At the close of the business day on October 5, 1931, when defendants took possession of the assets and property of the Franklin Trust Company, the outlying banks had in their possession $25,239.88 in cash, for forwarding to plaintiff's depository in New York City via the Franklin Trust Company. At that time, however, the Franklin Trust Company had not received any notice nor made any record on its books that the funds had been received by the outlying banks. The notices from the outlying banks were received by defendants after they had taken possession of the Trust Company.

The funds are now held in escrow and were definitely and specifically traced and identified in the outlying banks [fol. 163-17] as those of plaintiff. The Franklin Trust Company was not indebted to the outlying banks. The funds were not reduced to possession by the Franklin Trust Company nor had it set aside an equivalent amount of cash for transfer and delivery to New York.

The cases establish the proposition that the insolvency of the Franklin Trust Company by operation of law terminated its right to receive the funds.

Ellerbe et al. v. Studebaker Corporation of America, 21 F. (2d) 993 (C. C. A., 4th, 1927);

Commercial Bank of Pennsylvania v. Armstrong, 148 U. S. 50 (1893).

Judge Parker in the case of Ellerbe et al. v. Studebaker Corporation of America, supra (21 F. (2d) 993), stated at page 995:

" * * * it is universally held that the insolvency of a collecting bank at once terminates its authority to proceed further, and if collections are afterwards made, or those previously undertaken are completed, the proceeds

are held in trust for the owner, and can be collected from the receiver if they have come into his possession."

The decision of the Supreme Court of the United States in Commercial Bank of Pennsylvania v. Armstrong, supra (148 U. S. 50), must have been overlooked by this Court.

In the cited case the controversy was between two banks. The Commercial Bank of Pennsylvania sent paper for collection and credit to the Fidelity Bank in Cleveland, Ohio, the balances to be remitted tri-monthly. The Fidelity Bank agreed to "collect at par all points West of Pennsylvania and remit on the first, eleventh and twenty-first of each month" in consideration of the temporary use of the funds. Prior to its failure, the Fidelity Bank had sent some [fol. 163-18] of the paper to subagents for collection, and they had collected it and unconditionally credited the Fidelity Bank with the amounts collected before it had become insolvent. The Court held that the funds in the subagent banks were the property of, and belonged to, the Commercial Bank of Pennsylvania.

The Receiver in the cited case presented to the Supreme Court the same arguments urged by defendants, upon this Court, to wit (at page 55):

"The collection by the correspondent banks was a collection by the Fidelity Bank. The collecting bank was the agent of the Fidelity, and not of the Commercial. And, therefore, these payments are to be regarded precisely as if on those days these sums had been paid directly to the Fidelity Bank. They had all been credited to the Commercial Bank before the failure; they had been charged before the failure to the corresponding banks, and credited by the corresponding banks to the Fidelity National. No notice of the payment was necessary or usual."

Mr. Justice Brewer, speaking for the Supreme Court, answered this argument, at pages 56 and 57, as follows:

"We agree with the circuit Judge that *the relation created between the banks as to uncollected paper was that of principal and agent, and that the mere fact that a subagent of the Fidelity Bank had collected the money due on such paper,* was not a mingling of those collections with the general funds of the Fidelity, and *did not operate to relieve them from the trust obligation created by the agency*

of the Fidelity, or create any difficulty in specifically tracing them. As to such paper, the transaction may be described thus: The plaintiff handed it to the Fidelity, the Fidelity handed it to a subagent, the subagent collected it and held the specific money in hand to be delivered to the [fol. 163-19] Fidelity; then the failure of the Fidelity came, and the specific money was handed to its receiver. That money never became a part of the general funds of the Fidelity; it was not applied by the subagent in reducing the indebtedness of the Fidelity to it, *but it was held as a sum collected, to be paid over to the Fidelity, or to whomsoever might be entitled to it.* * * * If, before the subagent parts with the money or credits it upon an indebtedness of the agent bank to it, the insolvency of the latter is disclosed, it ought not to place the funds which it has collected, and which it knows belongs to a third party, in the hands of that insolvent agent or its assignee; and, on the other hand, *such insolvent agent has no equity in claiming that this money, which it has not yet received, and which belongs to its principal, should be transferred to and mixed with its general funds in the hands of its assignee, for the benefit of its general creditors, and to the exclusion of the principal for whom it was collected.* Whether it be said that such funds are specifically traceable in the possession of the subagent, or that the agent has never reduced those funds to possession, or put itself in a position where it could rightfully claim that it has changed the relation of agent to that of debtor, the result is the same. *The Fidelity received this paper as agent.* At the time of its insolvency, when its right to continue in business ceased, it had not fully performed its duties as agent and collector; it had not received the moneys collected by its subagent. They were traceable as separate and specific funds, and, therefore, the plaintiff was entitled to have them paid out of the assets in the hands of the receiver, for when he collected them from these subagents he was in fact collecting them as the agent of the principal. No mere book-keeping between the Fidelity and its subagent could change the actual status of the parties or destroy rights which arise out of the real facts of the transaction." (Italics ours.)

[fol. 163-20] The fact that the Franklin Trust Company drew checks against the funds in the outlying banks does

not destroy the agency relationship, for in the cited case, the Fidelity Bank was the only one who could draw checks against the sums in the possession of its subagents.

The facts in the case at Bar are much stronger than those in the cited case in favor of a recovery. In the Armstrong case the checks and drafts passed through the hands of the Fidelity which presented them to subagents for collection and credit to the Fidelity Bank. The subagents had actually collected the proceeds from the drafts and checks and unconditionally credited the Fidelity with the amount thereof. The Fidelity, in turn, had unconditionally credited the Commercial. In contrast, the fund in the instant case never passed through the hands of the Franklin Trust Company in any form whatsoever. The Franklin Trust Company did not even receive notice of the acceptance of the funds by the outlying banks until after its doors had been closed and it was declared insolvent. No notation of any kind had been made on its books.

It is submitted that defendants have "no equity in claiming * * * this money" and that it should be immediately turned over to plaintiff.

It is impossible for a debtor and creditor relationship to have existed between the Franklin Trust Company and the plaintiff in this case with respect to the $25,239.88 in the outlying banks. The day on which the Franklin Trust Company closed its doors it had not credited the plaintiff with this sum; it had not become indebted to the plaintiff for that amount. On October 5, 1931, the right of the parties was fixed and on that day no credit had been given by the Franklin Trust Company to plaintiff. The defendant [fol. 163-21] did not subsequently receive these funds. They are now held in escrow.

Wherefore your petitioner, plaintiff-appellant, prays your Honorable Court to order a reargument.

And it will ever pray.

General Baking Co., by its Attorneys, Conlen, LaBrum & Beechwood, by George E. Beechwood.

COMMONWEALTH OF PENNSYLVANIA,
County of Philadelphia, ss:

George E. Beechwood, being duly sworn according to law, deposes and says that he is a member of the law firm

of Conlen, LaBrum & Beechwood, attorneys for the petitioner, in above petition for reargument, and that said petition is not filed for any purpose of delay, but because he, the said George E. Beechwood, verily believes that grave injustice will result if the said petition is not granted.

George E. Beechwood.

Sworn to and subscribed before me this 26th day of October, 1934. Florence C. O'Neill, Notary Public. My commission expires February 21, 1937. (Seal.)

[fol. 164] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

WILLIAM D. GORDON, Secretary of Banking of the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Company, et al., Appellees

SUR PETITION FOR REHEARING

And Now, to wit, November 21, 1934, after due consideration, the petition for rehearing in the above-entitled case is hereby granted.

Philadelphia.

J. Warren Davis, Circuit Judge.

Endorsements: Order Granting rehearing. Received & Filed Nov. 21, 1934. Wm. P. Rowland, Clerk.

[fol. 165] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Appellant,

vs.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and Charles I. Engard (Successor to John J. Sullivan), Special Deputy in Charge, Appellees

And afterwards, to wit, 14th day of December, 1934, come the parties aforesaid by their counsel aforesaid, and this case being called for re-argument sur pleadings and briefs. before the Honorable J. Warren Davis and Honorable

J. Whitaker Thompson, Circuit Judges, and Honorable Guy L. Fake, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 11th day of September, 1936, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 166] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

v.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and Charles I. Engard (Successor to John J. Sullivan), Special Deputy in Charge, Defendants-Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

OPINION ON REARGUMENT—Filed September 11, 1936

Before Davis and Thompson, Circuit Judges, and Fake, District Judge

DAVIS, Circuit Judge:

This case is here on reargument.

On October 5, 1931, William D. Gordon, Secretary of Banking of the Commonwealth of Pennsylvania, closed and [fol. 167] took possession of the Franklin Trust Company of Philadelphia. Thereafter pursuant to the applicable statute of Pennsylvania he filed a certificate of taking possession of the property and business of the Franklin Trust Company in his office at Harrisburg, Pennsylvania, and a certified copy thereof in the office of the prothonotary of Philadelphia by whom it was referred or "assigned" to the Court of Common Pleas No. 5 of Philadelphia County.

The General Baking Company, a citizen of the State of New York, on April 25, 1932, filed a bill against William D. Gordon and John J. Sullivan, special deputy of Banking of Pennsylvania in charge, praying that $81,993.43 belonging to it, being part of the assets of the Trust Company, and taken in possession by Gordon, be declared a trust fund and that Gordon be directed to pay it over to the Baking Company as a prior claim. Gordon filed an answer denying that the money constituted a trust fund or that the Baking Company was entitled to priority.

In his answer he raised the question of jurisdiction of the District Court. He averred that it did not have jurisdiction to pass upon and adjudicate whatever rights the Baking Company might have in the premises. In support of this contention, when before this court, counsel for Gordon said:

"The District Court did not have jurisdiction of the Cause of Action.

The defendants contended in the court below, in their answer and in the argument, that the District Court for the Eastern District of Pennsylvania had no jurisdiction over the controversy. The Secretary of Banking took possession of the Franklin Trust Company by virtue of the Department of Banking Act of the Commonwealth of Pennsylvania of 1923 (June 15, 1923, P. L. 809, 7 P. S. 1). He is the Receiver of the Franklin Trust Company. The as- [fol. 168] sets in controversy were commercial assets belonging to the closed bank. The Bill in Equity was filed after the Secretary of Banking had taken possession of the Franklin Trust Company and had qualified as such, in accordance with the law."

The learned District Judge disposed of the question as follows:

"As to the jurisdictional question raised, I am satisfied that this court has jurisdiction. The Secretary of Banking is an administrative officer. His office exists by Statute. He is appointed by the governor and not by the court. He is not an equity receiver, and the mere fact that the statute provides that he shall have the rights, powers and duties of an equity receiver does not make him one, nor does the fact that the Common Pleas Courts of the state are given

jurisdiction to make certain orders and decrees relating to the conduct of the liquidation and the rights in the funds (does not) mean that the fund is in the custody of the court. That depends entirely upon the nature of the office of the liquidating officer and the power from which he derives his authority."

When the case came before us, on the first argument, we said:

"They (defendants) contend, since the Secretary of Banking had assumed control of the Trust Company and had become a statutory receiver, the State court thereby first acquired jurisdiction over the Trust Company. The District Court held that regardless of what the Secretary might be called, he was not an equity receiver and that the State court did not acquire prior jurisdiction because of the taking over of the Trust Company by the Secretary of Banking. The District Court accordingly held that it first acquired jurisdiction and continues to hold it."

[fol. 169] Neither the trial court nor we, when the case was here before, had the benefit of the opinion of the Supreme Court in the case of Gordon v. Washington, 295 U. S. 30, (decided April 1, 1935). In that case the court said that when the certificate of possession had been filed in Harrisburg in the office of the Secretary of Banking and a certified copy thereof with the prothonotary of the court of Common Pleas of Chester County, the Secretary of Banking had "the status of a receiver appointed by any court of equity of the Commonwealth". After stating that a receiver was appointed only as a means to an end, to some proper equitable relief, the court said:

"We have recently had occasion to point out that a federal court, even in the exercise of an equity jurisdiction not otherwise inappropriate, should not appoint a receiver to displace the possession of a state officer lawfully administering property for the benefit of interested parties, except where it appears that the procedure afforded by state law is inadequate or that it will not be diligently and honestly followed."

It further said:

"The appointment of receivers, in the circumstances, (because the bill did not pray for some equitable relief

beyond the appointment of receivers and because the appointment of receivers displaced the possession of a state officer lawfully administering property for the benefit of interested parties) was an abuse of discretion which should have been promptly set aside on the application of the petitioner. The decrees below will be reversed and the cause remanded with directions to the district court to dismiss the bills and discharge the receivers."

The procedure afforded by the state law is admittedly adequate and will be diligently and honestly followed. There [fol. 170] has never been any question about the fact of possession by Gordon of the assets, including the money here in controversy, of the Trust Company. The question before the District Court and this court was the status of Gordon and the character of his possession. We held in the case of Gordon v. Washington, supra, that he was not an equity receiver notwithstanding the fact that the statute invested him with the rights, powers and duties of such. But in the cases of Pennsylvania v. Williams, 294 U. S. 176; Gordon v. Ominsky, 294 U. S. 186; Penn Company v. Pennsylvania, 294 U. S. 189; Gordon v. Washington, supra, the Supreme Court held that when a state has adequately provided for the liquidation of a quasi-public corporation, such as we have in the case before us, by a department of the state government, the federal court should exercise a wise discretion and surrender jurisdiction to the state court even though jurisdiction was first assumed by the federal court, and to take or attempt to take possession of the assets of an insolvent building and loan association, or insurance company from the officials, provided by the state for their liquidation, in the absence of allegations that the procedure afforded by the state law is inadequate or that it will not be diligently and honestly followed, would be an abuse of discretion.

While in the case at bar, it is not proposed to take the res out of the possession of the Secretary of Banking, the suit does, however, take the adjudication of the issue involved from the state court and interfere with an admittedly proper and adequate procedure provided by the Commonwealth for the liquidation of the Trust Company under the supervision of Common Pleas Court No. 5 of Philadelphia. After the Secretary had closed the Trust Company,

taken possession of all its assets, filed the two certificates [fol. 171] required by law and the prothonotary had assigned the cause to Common Pleas Court No. 5, under whose supervision the Trust Company was to be liquidated, the logic of all the cases cited above forbade the District Court to assume jurisdiction, but having done so, it should have dismissed the bill when the facts were brought to its attention. When the case was first argued before us, we erred in not directing the dismissal of the bill.

The decree of the District Court is reversed and the cause remanded with directions to dismiss the bill.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 172] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1934

No. 5303

General Baking Co., Appellant,

v.

Luther A. Harr (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Co., et al., Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, and the cause remanded to the said District Court with directions to dismiss the bill.

Philadelphia, September 11, 1936.

J. Warren Davis, Circuit Judge.

Endorsements: Order Reversing Decree, etc. Received & Filed Sep. 11, 1936. Wm. P. Rowland, Clerk.

[fol. 173] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1934

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

vs.

LUTHER A. HARR (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and Charles I. Engard (Successor to John J. Sullivan), Special Deputy in Charge, Defendants-Appellees

MEMORANDUM CORRECTING OPINION—Filed September 11, 1936

Before Davis and Thompson, Circuit Judges, and Fake, District Judge

DAVIS, Circuit Judge:

In our second Opinion filed in this cause we said that "when the case was first argued before us, we erred in not directing the dismissal of the bill"; but as a matter of fact the District Court did dismiss the bill after considering the question raised on the merits, and our order reversing the decree and direction to dismiss the bill was an oversight. The Court should have dismissed the bill without adjudicating the questions raised by the pleadings, and we should have affirmed the decree dismissing the bill with directions to refer the cause to the State Court for due procedure there without regard to what was done in the United States District Court.

The decree dismissing the bill is affirmed with directions to refer the cause to the State Court.

Endorsements: Memorandum Correcting Opinion; filed Sept. 11, 1936. Received & Filed Oct. 16, 1936. Wm. P. Rowland, Clerk.

[fol. 174] In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1934

No. 5303

General Baking Company, Plaintiff-Appellant,

vs.

Luther A. Harr (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, et al., Defendants-Appellees

Appeal from the District Court of the United States, for the Eastern District of Pennsylvania

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court dismissing the bill of complaint in this cause be, and the same is hereby affirmed, with costs, with directions to the said District Court to refer the cause to the State Court.

Philadelphia, October 16, 1936.

J. Warren Davis, Circuit Judge.

Endorsements: Order Affirming Decree, etc. Received & Filed Oct. 16, 1936. Wm. P. Rowland, Clerk.

[fol. 175] United States of America,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of General Baking Co., Appellant, vs. Luther A. Harr (Successor to William D. Gordon), Secretary of Banking

for the Commonwealth of Pennsylvania, et al., Appellees, No. 5303, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 16th day of October in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 194] [Stamp:] Office of the Clerk, Supreme Court, U. S., Received Dec. 10, 1936

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1933

No. 5303

GENERAL BAKING COMPANY, Plaintiff-Appellant,

v.

WILLIAM D. GORDON, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of the Franklin Trust Company, and John J. Sullivan, Special Deputy in Charge, Defendant-Appellees

And Now, May 14th, 1936, William D. Gordon as Secretary of Banking of the Commonwealth of Pennsylvania in possession and control of the business and property of the Franklin Trust Company having resigned and Luther A. Harr having been appointed his successor, and John J. Sullivan, Special Deputy Agent in charge having resigned and Charles I. Engard having been appointed his successor, the said Luther A. Harr as Secretary of Banking of the Commonwealth of Pennsylvania in possession and control of the business and property of the Franklin Trust Company and Charles I. Engard as Special Deputy Agent are hereby substituted as parties defendant in the above cause.

Conlen, LaBrum & Beechwood, Attorneys for Plaintiff-Appellant. Bernard J. Kelley, Attorney for Defendant-Appellee.

It is hereby ordered that above substitutions be made.
J. Warren Davis, Circuit Judge.

Endorsements: Received & Filed May 15, 1936. William P. Rowland, Clerk.

[fol. 195] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Stipulation for Substitution of parties defendants-appellees, and order authorizing same, in the case of General Baking Company, Plaintiff-Appellant, vs. William D. Gordon, Secretary of Banking for the Commonwealth of Pennsylvania, in Possession of the Business and Property of Franklin Trust Co., et al., Defendants-Appellees, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 9th day of December, in the year of our Lord one thousand nine hundred and thirty-six and of the Independence of the United States the one hundred and sixty-first.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal United States Circuit Court of Appeals, Third Circuit.)

[fol. 178] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 18, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 41,099. U. S. Circuit Court of Appeals, Third Circuit. Term No. 559. General Baking Company, petitioner, vs. Luther A. Harr (Successor to William D. Gordon), Secretary of Banking for the Commonwealth of Pennsylvania, etc., et al. Petition for a writ of certiorari and exhibit thereto. Filed December 8, 1936. Term No. 559, O. T., 1936.